As the founder of the International Red Cross and Red Crescent Movement and promoter of the Geneva Conventions for the protection of war victims, the International Committee of the Red Cross has been represented on most battlefields for over a century. Nevertheless, more than 130 years after its establishment the ICRC remains largely unknown.

Although everyone has heard of the ‘International Red Cross’, the last-resort institution from which miracles are expected in times of great disasters, very few are familiar with its structure, its role and its potential for action, and even fewer are aware of the International Committee itself. International lawyers, for their part, have carefully avoided any close study of an institution which sits uneasily with their mode of thought and constantly defies classification in traditional legal categories.

How the International Committee of the Red Cross is constituted, what tasks are assigned to it and what principles guide its work – these are some of the questions which the author seeks to answer, by adopting a combined historical and legal approach designed to show how the development of international humanitarian law, of which it is both promoter and trustee, mirrors and is in turn reflected in the action taken by the ICRC.

This work, written in a simple and direct style, is primarily intended for all those involved in humanitarian action, but also for all those who are concerned about the protection of human beings amongst the horrors of war.

François Bugnion, Bachelor of Arts and Doctor of Political Science, joined the International Committee of the Red Cross in 1970. He served the institution in Israel and the occupied territories (1970–2), Bangladesh (1973–4), Turkey and Cyprus (1974), Chad (1978) and Vietnam and Cambodia (1979). From 1989 to 1996 he was Deputy Director of the ICRC’s Department of Principles and Law, and from 1996 to 1998 he held the position of Delegate General for Eastern Europe and Central Asia. He is now Director for International Law and Cooperation at the ICRC.
THE INTERNATIONAL COMMITTEE OF THE RED CROSS
AND
THE PROTECTION OF WAR VICTIMS
THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF WAR VICTIMS

François Bugnion

Foreword by Cornelio Sommaruga
Former President of the International Committee of the Red Cross

Translated from the French by Patricia Colberg, Edward Markee and Nicolas Sommer

INTERNATIONAL COMMITTEE OF THE RED CROSS

MACMILLAN
To Dr Christopher Reeves

From Oxford

... if I shall be condemn’d
Upon surmises ... I tell you
’Tis rigour and not law.

William Shakespeare,
A Winter's Tale,
Act III, sc. 2, ll. 114–16
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FOREWORD

MIRROR OF HUMANITY: EXPERIENCE AND CONSCIENCE

Cornelio Sommaruga, President of the International Committee of the Red Cross

Sans les individus, rien n’est possible. 
Sans les institutions, rien n’est durable. 
Jean Monnet

When the reader turns the last page of François Bugnion’s remarkable book, at least one image will remain forever engraved on his mind: the way in which the humanitarian work of the International Committee of the Red Cross is mirrored by and in turn reflects the development of international humanitarian law and the principles underpinning its action.

No matter what the ICRC does – to save a life or ease the suffering in an African, Asian or European prison, or to draft a treaty limiting the means of warfare and demanding respect for certain categories of victims – it has only one aim: to obtain respect for human dignity. The ICRC stands up for human dignity both on the battlefield, speaking to those who hold dignity in disdain and alleviating the intolerable suffering they inflict on their enemies, and in diplomatic conferences, thousands of miles from the fighting, convincing the powers that be – politicians, lawyers or the military – to help reinforce the rules protecting the victims of war. This interplay between each day’s new strategies of action to thwart violence, and the lessons drawn from them in order to adapt the rules accepted by the international community to contain that violence, is one of the principal messages conveyed by François Bugnion’s book.

Before examining the content of the book, the fruit of years of work guided by experience and research, a few words on the author and his relationship with the ICRC. François Bugnion, who has both a Bachelor of Arts degree and a PhD in Political Science, has witnessed countless conflicts first hand: in the Middle East, in Bangladesh, Turkey and Cyprus, in Chad, Vietnam and Cambodia, in the Caucasus and in Tajikistan, to mention only the ICRC theatres of operation in which he has worked or of which he has detailed knowledge. His responsibilities as Deputy Director of the ICRC’s Department of Principles and Law enabled him to combine that knowledge...
of the reality of war with an understanding of both the legal and the political considerations that are the backdrop to humanitarian work. Thanks to his contacts with the victims and protagonists of contemporary armed conflicts, his book conveys a sense of immediacy, of knowledge backed up by personal experience.

François Bugnion wrote the book on his own initiative, in the academic context of the Graduate Institute of International Studies in Geneva. It is not a command performance; the ICRC gave him no instructions, and he neither asked for nor received financial support from it. The fact that he did the research entirely at his own expense allowed him to express his views all the more freely.

Finally, although François Bugnion is close to the ICRC, his book cannot be considered to represent its official position. He does mention that position and the ICRC’s operational principles and policy, but he does not hesitate to distance himself from them and even to criticize the points of view he does not share: witness the pages on the ICRC’s refusal to offer its services as a substitute for a Protecting Power or on its attitude towards the American bombing during the Vietnam War.

The author also does not hesitate to discuss certain painful chapters in the ICRC’s history, in particular its attitude towards the Nazi persecutions and the Holocaust. His work gives fresh insight into that tragic period, examining it in relation to the ICRC’s responsibilities as a whole during the Second World War and international humanitarian law as it then stood, while not glossing over the organization’s failures.

The research carried out by François Bugnion has both a theoretical and a practical purpose. The theoretical aim is to improve and spread knowledge of the ICRC by giving a clear and comprehensive account of its work while attempting to explain why it did what it did. The practical aim is above all to show that, as was quite rightly observed by a former ICRC delegate, Thierry Hentsch, author of a book on the war in Biafra, ‘... law plays a role in humanitarian action, but not so much through the printed text in which it is laid down as by the strength of the precedent that creates it’. The wealth of precedents and their analysis is such that any ICRC delegate can find in this book a panoply of useful arguments to open doors that have remained shut, overcome hesitation by the soundness of their reasoning and persuade even the most hostile to reconsider their position.

Are those two objectives – the theoretical and the practical – compatible? Can the development of knowledge in the abstract, and the aim to instruct, by definition concrete, be pursued at one and the same time? For everyone who has read the book, the answer is a resounding ‘yes’. Thanks to its clear structure, its index and bibliographical references, it can be used like an encyclopaedia, both as a source of information and as a means to discover the originality of the thoughts of others. And if by chance the reader inclined to single out specific sections takes the time to browse, he will find in each chapter’s introduction and conclusion a summary, often philosophical in
nature, introducing him to a universe of thought so fascinating that he will be reluctance to leave it.

François Bugnion’s book is wide in scope, covering the protection of conflict victims in the broad sense, i.e. all the humanitarian activities by which the ICRC helps people affected by war. But he sets the limits at the outset. He defines war, whether declared or not, as ‘armed conflicts between nations or groups of people’, excluding all situations of internal strife that do not entail the application of international humanitarian law. He focuses on those of the ICRC’s activities and decisions that illustrate his purpose, namely to show that the ICRC has a mandate to protect the victims of armed conflicts and therefore has functional international legal personality. He refers to the ICRC’s tasks in time of peace or to its co-operation with the National Red Cross and Red Crescent Societies only in so far as they relate to his subject. Finally, the impressive panorama he draws of the history of armed conflicts and the role played in them by the ICRC since the battle of Solferino (1859) goes no further than the Second World War and its aftermath, although certain more recent situations are mentioned, in particular the Gulf War, which he knows well because he helped direct ICRC operations during it. The frame is therefore clear.

So is the book’s underlying theme. By using a multidisciplinary approach, at one and the same time historical, legal and specific to political science, François Bugnion shows how international humanitarian law and ICRC action each evolve in reaction to the other. He starts by analysing ICRC practice. In Book I, the historian retraces the conflicts that shaped international humanitarian law and the initiatives taken by the ICRC in response to them, alternating his account with a description of the lessons drawn from those conflicts by the ICRC, International Red Cross and Red Crescent Conferences and diplomatic conferences. He conceals none of the difficulties encountered by the ICRC in its search for new solutions to humanitarian problems rendered ever more complex by the changing nature of armed conflict.

In Book II, the author departs from the chronological approach and examines the sources of the legal regime applicable to the ICRC, namely the Geneva Conventions and their Additional Protocols, customary international law, Red Cross law and special agreements. On the strength of that analysis, he examines the ICRC’s offers of services and its activities on behalf of four categories of protected persons: wounded and sick military personnel in war on land; wounded, sick and shipwrecked military personnel in war at sea; prisoners of war and civilian detainees; and the civilian population. The picture would not have been complete without some discussion of the implementation of international humanitarian law, whether in terms of the relationship between the tasks of the ICRC and those of Protecting Powers, or of the ICRC’s possibilities for action when faced with violations of international humanitarian law. As he or she turns the pages, the reader grows familiar with the duties and prerogatives assigned to the ICRC in contemporary humanitarian law.
Book III rounds off his study with truly impressive logic: François Bugnion writes about the ICRC’s acknowledged international legal personality, its capacity to possess both rights and duties under public international law and to avail itself of them vis-à-vis states. Far from being merely an association under Swiss private law, the ICRC emerges as a key player on the international scene, able to talk with states, to conclude agreements with them and to remind them of their obligations. The time has come, he writes, ‘for the ICRC to realize all that this means and to shoulder the responsibilities it brings’. For the ICRC as described by François Bugnion does often appear overly fearful, too centred on the positive law beyond which it hesitates to step, too worried about the reactions of states as it foresees them, to the point that, for example, it shies away from offering its services as a substitute for Protecting Powers.

François Bugnion is right. An institution that speaks in the name of the victims and that has been given such scope for action by the states must have the strength to speak clearly to the parties to conflicts about their responsibilities, in the framework of a relationship of trust or at least of mutual comprehension. The victims and the players on the international scene expect much more of it than relief operations, even though such operations are often of vital importance. They also expect it to uphold the universal principles underlying respect for human dignity – so long, of course, as they themselves are not called into question! There are times when the ICRC requires great courage to speak firmly to the states, even in confidence, because it thereby risks jeopardizing its access to the people it wishes to protect. This dilemma will never be solved, but in a world of proliferating humanitarian organizations, the ICRC has a specific role to play that the others cannot because they do not have the same responsibilities.

The length of the book and its wealth of detail should not deter the potential reader, and it would be a big mistake to use it only as a reference work. The author invites us on a journey, not into the past but in the world of today and quite possibly of tomorrow. The book is highly topical, for although the conduct of hostilities evolves over the years, even if only in technological terms, the problems remain the same. Similar questions recur in each new conflict. How is the principle of immunity of the civilian population from attack to be maintained in the case of aerial bombardment? What position to take with regard to bombing and shelling that are governed more by jus ad bellum than by jus in bello? Should the ICRC encourage the establishment of safety zones, at the risk of weakening the protection of the civilian population elsewhere in the territory? What is and what is not a military objective – what are the limits to this concept? The account of air raids during the Spanish Civil War, the Italo-Ethiopian War of 1936, the Second World War and the Vietnam War shed interesting light on these subjects. Moreover, the many parts of the book devoted to the characteristics of impartial, neutral and independent humanitarian aid are all the more cogent at a time when the support role of the armed forces, and even their role as
‘humanitarian’ players in theatres of conflict, is a matter of much debate. And what could now be more relevant, when international tribunals are looking for credible witnesses, than the discussion of the ICRC’s attitude in the face of violations of international humanitarian law, in which François Bugnion highlights the difficulty – and often the impossibility – of reconciling relief work and public denunciation?

Another interesting aspect of the book is the proposals it makes. Some of them have already been put into effect by the ICRC since the original French edition appeared, such as the conclusion of a headquarters agreement with Switzerland, signed in Berne in 1993 and confirming the International Committee’s independence and freedom of action. Another example: as François Bugnion rightly points out, the ICRC possesses rights and duties that are founded in customary law, and it should to a greater extent take state practice and its own practice as a basis for its future activities. The major study on customary law currently being conducted by the ICRC’s Legal Division with the help of international experts is a tangible outcome of his thoughts. Finally, there can be no doubt that the pages on the communication by the ICRC of its reports on visits to places of detention have influenced its practice. This hardly comes as a surprise, for the author is a senior ICRC executive and was thus able to help promote the ideas he developed while working on his thesis.

Many of the book’s recommendations urge the ICRC to recognize its obligations. The author expresses surprise, for instance, that the ICRC does not feel bound to offer its services to the parties to an armed conflict, for he believes that it has not only the right to carry out the tasks assigned to it by the Geneva Conventions, but also the duty to do so. The fact that the Conventions often cite the ICRC merely as an example, stipulating that an impartial humanitarian institution such as the ICRC may offer its services to the parties to a conflict, does not release it from this obligation.

According to the author, the ICRC is obliged to offer its services in the event of armed conflict for three reasons. First, the Geneva Conventions often refer specifically to it. Admittedly, they confer few obligations on the ICRC, but they do give it rights which are the corollary to a duty to act: the right to be notified of the identity of prisoners of war and civilian internees; the right for its delegates to visit them and speak in private with the captives of their choice; the right to have its special position in relief operations recognized at all times. Second, account must also be taken of its previous practice, if only because of the principle of impartiality which obliges it to work without discrimination for all conflict victims. Last but not least, the Statutes of the International Red Cross and Red Crescent Movement leave no doubt about the ICRC’s duty to carry out the tasks assigned to it by humanitarian law. In short, the Conventions should be read in the light of state practice, and state practice, says François Bugnion, creates obligations for the ICRC.

This is an important point. Having said that, though, I think that while the ICRC may appear fearful, or cautious, when it comes to concepts, it is daring
in terms of action, as evidenced by every one of its humanitarian initiatives. It may not publicly undertake to follow one line rather than another, but it does so essentially out of concern to retain the widest possible freedom of action, the better to serve the victims of war. Moreover, a careful analyst would be hard put to find an armed conflict that qualified as such and in which the ICRC had not offered its services.

François Bugnion’s book is, as we have said, highly topical; it is also extremely instructive for the ICRC and for humanitarian action in general. A third point to its credit is that it brings the ICRC’s specific character into sharp focus, even though it is not discussed at length. There are many more humanitarian organizations today than in the past, and the ICRC often finds it difficult to gain understanding for its unique nature. Despite its continuing efforts to do so, it is well aware that alliances between humanitarian organizations are a source of strength and that co-operation with others is essential to promote the humanitarian imperatives it upholds. The ICRC must learn to live with this dilemma, torn between the desire to stress its difference and concern not to find itself marginalized by standing too far apart. Such is its fate.

The ICRC’s sui generis character lies in the dialectic relationship between its operational activities and international humanitarian law, which it not only develops, interprets and promotes but also helps to implement, often advising states to go beyond the actual treaty provisions when they prove inadequate. Its unique nature also seems to me to stem from its independence, which allows it to maintain close contacts with non-state protagonists without modifying their legal status. An intergovernmental organization cannot always do this.

In what way is the ICRC’s specificity useful? After all, is not every organization specific in some way? Of course, but there are some services that the ICRC, as a specifically neutral and independent institution and intermediary, is often best placed to render, or that it alone is capable of providing. Its ability to cross the front lines or escort others across them, to evacuate the wounded, to return released captives to their homes, to reunite family members, to get through with relief convoys, to replenish hospital stocks, is a perfect illustration of this. And I would go even further by saying that the ICRC’s humanitarian diplomacy, which differs from state diplomacy, enables it in exceptional situations to play a role that the states could entrust to no one else. One well-known example was its availability during the Cuban missile crisis, in October 1962, to check the cargo of Soviet ships bound for the Caribbean. Equally significant was its willingness to evacuate combatants from besieged Beirut in 1982 in order to avoid a bloodbath among the civilian population. The ICRC’s role in that operation was ultimately limited to taking charge of the wounded, whereas the able-bodied combatants, who insisted on taking their personal weapons with them, were evacuated by national contingents of the Multinational Peacekeeping Force. This was a welcome solution, as the ICRC had serious misgivings, for ethical, legal and
security reasons, about taking part in the operation as initially proposed. Nevertheless, the fact that it considered doing so, if formally requested by all the contending parties, is evidence of the range of activities it might be prepared to undertake as a neutral intermediary to help protected persons, in this case civilians, in distress.

François Bugnion has sifted through the published sources – annual or other reports, circular letters, notices, communiqués, draft conventions, and official records of diplomatic conferences – with meticulous care. The same thorough analysis was made of unpublished sources: minutes of the ICRC Assembly and Executive Board meetings and files in the ICRC Archives (correspondence with governments and National Societies, instructions to delegations, minutes of conversations, delegates’ reports, and so on). Each subject is accompanied by a very useful bibliography ... when there was one. Surprisingly enough, no study of such basic subjects as the ICRC’s rights and potential obligations under customary law existed at the time the book went to press. The bibliography also shows that there were then no more than six truly academic works on the ICRC, all historical in nature. The gap has certainly now been filled.

The book is enhanced and its message is accentuated by the beautiful photos, in particular the one on the cover, which give the sense of poignancy without which any reflection on the alleviation of suffering would be incomplete. How could anyone remain unmoved by the gaze of the child wrapped in a sack marked with the red cross, a look that expresses a seriousness beyond his years, an appeal to which no one can remain insensitive, a dignity that distress only serves to reinforce?

In closing, let us turn to the future, as outlined by François Bugnion in his conclusion. I believe, as he does, that it is wishful thinking to hope that world conflict will diminish as the new millennium dawns. On the contrary, there is every indication that while the fracture lines of the Cold War have ceased to exist, clashes of varying intensity, especially within states, will grow in number and spread, often leading to the involvement of other states and recurring on a cyclical basis. The deepening impoverishment of certain parts of the world or sectors of the population, inter alia because of the effects of globalization, the weakening of the nation-state, the increase in assertions of ethnic or regional identity, the emergence of new and especially economic forms of power, the rise in the number of unpredictable threats (the growth of criminal organizations, drug trafficking, sects, and the like), will add to the complexity of the conflicts faced by future generations. In addition, mankind will have to cope with major ecological and demographic challenges, making it even harder to prevent and settle wars and to ease the suffering they entail.

The ICRC must work out medium-term strategies to meet those challenges. To use François Bugnion’s eloquent image: ‘The International Committee’s history is like the drum of a seismograph which records all the crises through which humanity passes.’ The ICRC cannot have any significant impact on future curves on the seismograph, even though its activities may have a
pacifying effect, but it must try to plan ahead for what can be foreseen and gear up to deal with what cannot. It will have to respond to unprecedented human tragedies in the glare of the media spotlight, and take full advantage of its unique role as neither an international organization, a non-governmental organization or a mere association under Swiss civil law. Will it be able to rise to the occasion?

I am convinced that it can. Over the years, the states’ trust in the ICRC on the international scene has grown. It was granted observer status by the United Nations General Assembly in 1990; this was both a consecration and a point of departure. The fact that the relevant draft resolution was presented by 138 co-authors and adopted by consensus was a great source of encouragement, especially as the ICRC was the first organization – other than intergovernmental organizations – to be accorded that status. New impetus was thus given to its work: the ICRC has spoken out in defence of the interests of victims of war in countless international fora in the past ten years, in connection with anti-personnel landmines, laser weapons, an international criminal court and the protection of cultural objects, to mention only the most important issues it has addressed. It has also developed its contacts in theatres of hostilities with all non-state contenders willing to open a dialogue with it. Above all, its delegates have tried to devise new approaches to help the victims of situations where it takes a great deal of courage to venture, owing to the steadily increasing risks involved.

The ICRC will obviously have to tread cautiously. The road will be far from smooth, and surprise developments doubtless lie ahead. But in its arduous struggle to protect the victims of war, it can turn to François Bugnion’s book and draw on both the intellectual analysis and the practical knowledge of armed conflicts it contains. These lines are an expression of the ICRC’s deep gratitude to François Bugnion.

May the International Committee of the Red Cross of tomorrow continue to ‘transform into conscience as broad an experience as possible’, as André Malraux wrote in l’Espoir, so as to end the intolerable suffering it witnesses and convince mankind to advance towards greater respect for human dignity.

December 1999
GENERAL INTRODUCTION

Toute la dignité de l’homme
est en la pensée.
Pascal, Pensées,
Bibliothèque de Cluny,

Founded in the mid-nineteenth century in the aftermath of the bloody battle of Solferino, the International Committee of the Red Cross had two primary objectives: to promote the creation of societies for aid to wounded soldiers – the future National Red Cross and Red Crescent Societies – and to encourage the adoption of an international agreement to recognize the neutrality of medical services on the battlefield. Very soon, however, the Committee found itself faced with a challenge that it had not initially foreseen but which was to prove an essential part of its work: carrying out relief activities for the victims of war.

It soon became apparent that to be fully effective, the new National Societies needed the support of a third party, independent of them all and able, if war broke out, to restore links disrupted by the hostilities and maintain communications between Societies of belligerent countries; such contact was essential for the Societies to accomplish their common task.

It was also evident that the humanitarian agreements which the Committee’s efforts had brought into being could likewise not take full effect without the active involvement of a neutral intermediary, charged with assisting in their implementation. Throughout its history, the International Committee has shown that it is both able and willing to carry out this role.

So while the Committee started out as the promoter of an idea, it was before long asked to assume the role of neutral intermediary – first between the relief societies, and then also between the belligerent states; the course of history led it to play a small but vital part in implementing the humanitarian rules which it had itself championed.

With each successive conflict, the Committee’s activities continued to expand and the types of situation in which it was requested to intervene became increasingly varied. In one way or another, almost every country in the world came to benefit from its work.
And yet, almost 130 years after its foundation, the International Committee of the Red Cross remains very largely unknown. The general public and the media often talk about ‘the International Red Cross’ as a kind of miracle-working organization, humanity’s last hope when disaster strikes; but few are aware of what it is, and what it can and cannot do.

Legal experts have largely avoided commenting on the ICRC, since it did not fit into their usual patterns of thought; those who have mentioned its existence have not always been accurate in their views. Some observers confuse the International Committee with the Swiss Red Cross or the International Federation of Red Cross and Red Crescent Societies; others believe it to be the humanitarian wing of the Department of Foreign Affairs in Berne, thereby casting the Committee in a supporting role to Swiss diplomacy. Others again have sought to apply the theory of international organizations in their analysis of it, and have been surprised to discover that the Committee is not part of the United Nations.

Admittedly, the very nature of the Committee seems a contradiction in terms: it was established as a private body, but derives its mandate from international law; its work is international, although its members are private individuals, all of them Swiss; its activities are based on international treaties to which it is not itself party, in other words its very existence is a constant challenge to standard legal categories.

Governments also sometimes appear to be unsure how to deal with the Committee, and where to place it on the chessboard of international relations: it is not a state, nor an international organization in the usual sense – but neither can it be classed as a simple charity under private law, whose work is of minor concern to the authorities. What sort of relations should states enter into with the ICRC? Which government office or ministry should be responsible for those relations – Foreign Affairs, the General Staff of the Armed Forces, Social Welfare …? Then again, can the ICRC’s activities be regarded as charity work requiring nothing more than distant supervision?

There is similar confusion about the status of the Committee’s delegates in the field: should they be granted diplomatic privileges and immunities? Should they be considered as international civil servants – or as representatives of a voluntary relief organization, ordinary individuals entitled to no particular status? The wide range of solutions found by governments to these questions underscores the uncertainty felt by the international community, and the absence of a generally accepted policy.

These doubts highlight the fundamental question of the ICRC’s legal personality, to which no standard definitions apply. ‘I know of no part of jurisprudence, or of human science, to which the institution calling itself the Geneva Committee can be assigned’, the renowned Russian jurist Fyodor Fyodorovich de Martens told the Fourth International Conference of Red Cross Societies which met at Karlsruhe in September 1887. He went on: ‘In 1864 a child, beloved of us all, was born in Geneva. This child received the
name of “International Committee”; it was christened but not registered, it was never presented to the mayor in his capacity as registrar. More than a hundred years later, the situation is virtually the same: the registrar still has no clear idea where to enter the name of the International Committee; it remains, as an informed observer more recently put it, ‘the international unknown’.

The minutes and proceedings of the International Committee show that its members were sometimes unclear about its duties and responsibilities, even in situations where precedents had already been set, and that it spent little or no time analysing its legal personality or its status. On the rare occasions when external events forced it to do so, the discussion usually stopped short of any conclusion. The same impression is conveyed through the Committee’s published works: throughout its history the ICRC has produced a vast number of documents and publications, of universally acknowledged academic standing, covering just about every aspect of international humanitarian law – but little of this has touched on the Committee’s mandate or the basis for its work, and even less on the ICRC’s position in contemporary society or the international legal order. The Committee’s overriding preoccupation has been to examine and define the rights and duties which humanitarian law assigns to belligerents, rather than its own position.

The Committee can hardly be blamed for this: it was created with the purpose of coming to the aid of the victims of war, which was – and remains – the reason for its mandate from the international community. Introspective meditation was never its raison d’être. It is, therefore, natural for the Committee to concentrate its energies on bringing help to the victims and on carrying out its various tasks.

However, action that is not guided by reflection will soon lose momentum, caught in the quicksands of short-sighted activism, just as reflection that is not based on experience can be no more than idle contemplation, adrift in the icy infinite space of abstract thought. In the growth of any organization – or individual, for that matter – it is sometimes necessary to put work aside, to disregard the pressures of everyday activity and the demands of immediate tasks, in order to re-examine the basic direction one has taken, the principles one is following and the limits to one’s capabilities, and to look at oneself critically, though not harshly. Ἐγνώθει σαίγετόν – ‘Know thyself!’ decreed the oracle of Delphi. That advice is as valid for institutions as it is for individuals.

Such were the considerations that prompted me to write this book.

In practical terms, the aims of the book are first, to look at the tasks and prerogatives assigned to the Committee by international humanitarian law for the purpose of protecting victims of war; and second, to attempt to define the legal personality of the Committee within the context of the law of nations.
There is however no founding charter setting out the International Committee’s mandate: its present profile has been shaped by a slow process of development and the gradual setting of precedent. It would therefore be impossible to understand fully the ICRC as it is today without looking at its historical background. So before trying to determine its mandate under current humanitarian law, we must first retrace the steps of this evolutionary process.

The book is accordingly divided into three volumes:

- Book I tells the story of the International Committee from the battle of Solferino to the end of the Second World War, showing how the international community gradually gave the Committee its duties and responsibilities; this overview is also intended to show the interaction between the initiatives taken by the Committee and the development of humanitarian law.

- Book II sets out to specify the foundations, scope and limits of the tasks and responsibilities assigned to the International Committee, under contemporary humanitarian law, to protect the victims of conflicts; this is discussed not only in the light of the Geneva Conventions of 12 August 1949 and their Additional Protocols, but also with regard to all sources of humanitarian law as well as ICRC practice.

- The aim of Book III is to try to define the legal personality of the International Committee – does it in fact have the slightest claim to such status? Does it, in other words, have the capacity to possess rights and duties under international law, and to maintain them at international level?

It might seem illogical, at first sight, to study the tasks and responsibilities of the International Committee before going into the question of its legal personality. Would it not be better to do things the other way round and start by asking whether the Committee is entitled to possess these rights and duties, before examining their foundations, scope and limits?

The answer has to be ‘no’. If, indeed, the International Committee does have any international legal personality at all, it can, in the light of positive law and current opinion, only be a personality based on its function; in other words, it would consist of all the attributes the Committee needs to carry out the tasks it has been given by the international community. However impatient we may be to examine the question of the Committee’s legal personality – on which, in the final analysis, every other consideration depends – it would be pointless to do so without having first studied the tasks and responsibilities assigned to it by international humanitarian law.

We shall accordingly adopt an empirical approach: we shall accept, but only as a working hypothesis, that the International Committee is entitled to possess rights and duties founded on international law; on the basis of that hypothesis, we shall then examine the tasks and responsibilities conferred on it; and finally check whether the original hypothesis was right. This might seem a roundabout approach, but it is the only one possible.
contains a risk, in that only at the end of the study will we be able to judge whether it was worthwhile embarking upon it, but of course that risk is inherent in all scientific investigation.

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The area covered by this research must now be defined. The International Committee, as we have seen, was formed to promote the creation of relief societies for aid to wounded soldiers, as well as a treaty to protect military medical services in the field, but it soon became engaged in direct action for war victims. It thus went beyond the promotion of humanitarian law and took an active, practical part in its implementation.

The Committee’s field work was initially concerned with the victims of wars between nations. It could not, however, ignore the suffering caused by civil wars, nor turn a deaf ear to the cries for help of the victims of internal disturbances and tensions. Such situations may not be armed conflicts in the strict sense, but they are nevertheless marked by acts of violence or repression which produce victims – and they may indeed be the early warning signs or the after-effects of a civil war.4

For all that, the International Committee did not set aside its previous concerns, but continued to foster the development and the cohesion of the Societies which it helped to found and, as far as it could, to work for further improvements to the rules of humanitarian law.

The ICRC’s activities may therefore be grouped under three headings:

- activities stemming from its position within the International Red Cross and Red Crescent Movement;
- the development and promotion of humanitarian law;
- the protection of victims of armed conflicts and of internal disturbances and tensions.

This book is unable to deal with the first two categories. In the following chapters there is no analysis of the position and role of the International Committee in relation to the Red Cross as a whole, nor a detailed breakdown of its efforts to develop humanitarian law. These questions are touched on in passing, inasmuch as they shed light on the main subject.

In setting these limits I am only too aware of committing a serious injustice to the National Red Cross and Red Crescent Societies and to their Federation. Their support, without which the ICRC would be unable to accomplish all its tasks, does not receive here the attention it deserves. Moreover, the book does scant justice to all the other humanitarian organizations which provide invaluable support for the Committee’s work. This is to be deeply regretted, but it must be seen as the price for achieving the main objective. I hope that it may be possible, in a later publication, to pay proper tribute to the National Societies and their Federation.
I have also had to make a conscious decision not to deal with the work of the International Committee for victims of internal disturbances and tension. This, however, is a less serious omission, as these activities are already the subject of a study of outstanding scholarship.5

In concentrating on the International Committee’s activities for the protection of the victims of war, in both international and internal armed conflicts, my purpose has been to include all situations covered by the Geneva Conventions and their Additional Protocols. A line is thus drawn between circumstances that are covered by treaty rules – armed conflicts, the subject of this book – and those that are not, namely internal disturbances and tensions, which will not be included.

Even within the defined field of study, two interesting questions have had to be put aside, as they would have required too extensive consideration: the problems posed by the intervention of armed forces under the auspices of the United Nations or of regional organizations, and the protection of the victims of armed conflicts who have sought refuge in a third country. This does not mean that the International Committee is not entitled to offer its services in these cases: they have been left out because of the complex legal issues they raise – to discuss which would make the book even longer than it is.

This study will consequently be confined to the ICRC’s activities to protect the victims of conflict, in particular those to shield them from the violence of hostilities, and those in aid of people who are in the power of an adverse party.

The reader might think that, having thus narrowed its scope, the study will have little left to offer. Tragically, the horrors of war are so numerous, and the activities of the ICRC to protect the victims of such paroxysms of violence so diverse, that it is barely possible to detail them all.

At this point the concept of protection must itself be explained. Neither the Geneva Conventions nor the Statutes of the International Red Cross and Red Crescent Movement define it, probably because the term is commonplace and its meaning sufficiently clear.

Its first connotation is of a covering, a roof or shelter offering protection against the elements for people or objects. It can also be thought of as a screen, a shield or some kind of safeguard between someone (or something) and a potential threat. Protection, then, is seen as a shelter, a shield or fortification, assistance, defence, support, help and rescue.

In the Red Cross order of ideas, protection can be defined as encompassing any humanitarian act whose purpose is to save the victims of conflict from any danger, suffering or abuse of power to which they might be subjected, to defend them and to give them assistance.6 Let us be clear about one thing, though: strictly speaking, it is the rule that protects, that limits the violence during hostilities and that comes between the victims and the dangers threatening them.
Quite obviously, it is the responsibility of the belligerents to honour their commitments. But very often implementation of humanitarian rules calls for the intercession of a third party charged with monitoring the observation of those rules or with helping to apply them. So it is first and foremost by promoting implementation of humanitarian rules and principles that the Red Cross protects the victims of war. Protection therefore includes the steps taken to insist on respect for the humanitarian rules and principles, as well as measures to ensure their implementation.

Seen from a broader perspective, the notion of protection extends to all those activities which seek to shield the victims from suffering and death and to safeguard their rights; it includes the provision of material assistance when the belligerents’ own resources are insufficient to ensure that the victims are cared for properly, or when the will to provide such care is absent.

The concept of protection is therefore open to two interpretations: in the narrow sense, it includes all measures which seek to ensure that the rights of the victims are respected. In a wider sense, the term encompasses all humanitarian activities – including relief operations – whose object is to safeguard the victims of war and to preserve their life, health and dignity.

The Statutes of the International Red Cross and Red Crescent Movement state that the role of the ICRC is, among other things:

to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.7

Nothing in the preparatory work for the adoption of the Statutes leads us to suppose, on reading the words ‘protection and assistance’ that two distinct activities were envisaged which could, if so desired, be separated. It is much more likely that the two words were used to define more clearly a single, unified concept, with no intention of weakening the basic coherence of the humanitarian gesture. In any case, the two notions cannot, in practical terms, be separated. When food is given to the starving, when medical assistance is provided to the sick and wounded, that is the first means of protecting life and preventing suffering. Indeed, as the ICRC has put it, ‘assistance activities often assume the character of protection operations and vice versa, to such an extent that they become inseparable’.8

In this study, unless otherwise defined, the term protection should be understood in the widest sense, to encompass all humanitarian activities – including relief – undertaken by the International Committee to safeguard the victims of war and bring them help. The term victim is, unfortunately, only too clear and calls for no comment at this point.

As for the notion of war, it should be taken in the broad sense, without qualification, to cover armed conflicts between nations or groups of people. Whether or not war has been declared, in accordance with the rules of inter-
national law, is of little importance either to the victims or to a humanitarian organization such as the ICRC.

The means used to research this book were dictated by the subject itself. Every organization develops over time. This observation applies to all international organizations, but especially to the International Committee of the Red Cross, for it has no founding charter which laid down its terms of reference in advance. Its duties and responsibilities stem instead from a variety of initiatives and the gradual accumulation of precedent, and thus from the practice adopted by the International Committee and the acceptance of that practice by the international community. It is essential, therefore, to consider first of all the historical approach.

This approach alone, however, will not suffice. Given that this book’s main objective is to define the tasks and responsibilities of the International Committee in terms of protection for the victims of war and, therefore, its rights and duties vis-à-vis the parties to a conflict, we must also make a legal analysis. As the ICRC is a body that operates in the international sphere, we must look to the instruments of public international law to guide us.

I shall therefore seek to combine the historical and legal approaches so as to show clearly the interaction between law and practice, and the dialectical process which underlies everything the Committee does.

No one should find fault with the historical approach; any object, body or event that has a dimension in time – and history is, after all, only a moment behind us – can be viewed from an historical perspective.

Lawyers, however, might frown upon our approach. Two objections must be faced straight away – unless they can be dismissed, the book can go no further.

The first objection relates to the origin of the International Committee, and can be summarized as follows: A privately established organization cannot be vested with rights and duties stemming from public international law; international law cannot, therefore, be used as a basis for analysing that organization’s tasks and responsibilities.

In the first instance, one would reply by saying that this objection forestalls the debate as to the Committee’s legal personality which, as I have already pointed out, cannot be determined before the functions assigned to it are examined. The objection also shows a marked ignorance of international relations: nothing prevents governments who so wish from giving a private institution rights and duties under public international law, as well as the capacity to ask states to respect them. It is the existence or otherwise of the rights and obligations that we have to ascertain, and only public international law can answer that question. The first objection, then, must be discounted.

According to the second objection: The International Committee is no more than a relief society whose work is founded on humanitarian and
charitable ideals; how could charity and humanitarianism be regulated by rights and obligations? This view classifies the International Committee as some kind of para-legal entity which defies attempts at legal analysis.

The Committee would certainly never deny the charitable and humanitarian motives of its founders and we hope and trust that the same motivation is as strong as ever today. It is true, though, that charity cannot be governed by laws and decrees.

However, the following predicament then arises: either legal analysis allows us to define what makes up society at international level, including the work of a humanitarian body such as the International Committee, or we have to acknowledge that political scientists are right when they claim that public international law is nothing but a closed circuit, orderly, no doubt, intellectually stimulating, perhaps, but completely cut off from reality and therefore unable to teach us anything. It is, they contend, like a bubble: the world is reflected in it, but as soon as it touches something solid it bursts. This argument is directed less against the proposed approach than against the relevance of international law itself. Clearly, an argument that calls into question its own basis is untenable; like the first objection it, too, must be rejected.

The pertinence of the legal approach is thus confirmed. Whether the author uses the approach correctly is another question, and one for the reader to answer.

Now that these objections have been set aside, it is time to set off on our journey. But first, a word on the sources used for this book.

Published sources

I have consulted all the ICRC’s published reports, issued annually or otherwise, as well as the circulars, notices and other announcements made in the *Bulletin international des Sociétés de la Croix-Rouge* (1869–1918), and the *Revue internationale de la Croix-Rouge* (1919–91, also published in English since 1961). Also consulted were the draft conventions submitted by the ICRC to the various International Conferences of the Red Cross, to conferences of experts meeting under the ICRC’s auspices and to diplomatic conferences for the development of humanitarian law. I have furthermore studied the minutes of the October 1863 Conference which gave rise to the Red Cross, and the official records of the 25 International Conferences of the Red Cross held since the beginning of the Movement.

It was impossible to make a systematic study of the official records of the Diplomatic Conferences held in Geneva in 1864, 1868, 1906, 1929, 1949 and 1974–7, which resulted in the Geneva Conventions and their Additional Protocols, or the minutes of the meetings of experts – of the Red Cross or of governments – which preceded the Diplomatic Conferences of 1949 and
1974–7. In both cases the volume of some of these documents was a deterrent. However, I did examine the records of all discussions concerning draft articles which seemed likely to confer duties and prerogatives on the ICRC, either directly or indirectly. The same approach was used for the official records of the Conferences of St Petersburg (1868), Brussels (1874) and The Hague (1899 and 1907), which laid the foundations for the law of war.

Unpublished sources

The ICRC generously gave me access to all its archives, files and minutes of meetings. I was allowed to consult any document I wished, with the exception of personnel files (employees, and members of the Committee) and the minutes of meetings held in camera, which as a rule deal with personnel matters (elections, appointments, and so on). None of those documents had the slightest relevance for my work, so I can say that I was authorized to consult any document related to the subject of this book.

That being said, choices had to be made. The minutes of the International Committee are both a reflection of the soul of the organization, and its memory bank. I was able to go systematically through the minutes of the Assembly (meetings of the entire Committee) and the Executive Board (called the Presidential Council until 1973), for the period 1949 to 1991. For the earlier part of the ICRC’s history an incomplete perusal of the records was made, concentrating on periods which seemed the most important in the present context: the early months of the Committee (1863–4), the Franco-Prussian War (1870–1), the First World War and the Russian Civil War (1914–21), the start of the Spanish Civil War (1936), and so on.

Archives supply the historian with the raw materials of his work: correspondence with National Societies and governments, records of meetings, instructions to delegations, delegates’ reports, letters and telegrams, etc. While the files consulted ran into the hundreds, it was simply not possible to look up the original documents for every event and episode mentioned in this book, as this would have required more than a lifetime’s research. In-depth archival research had to be limited to a number of ICRC operations which appeared to be of particular significance; for others I relied on published accounts, especially the Annual Reports, and on the minutes of the Assembly and Executive Board. In some cases these were supplemented by summary checks with archival records in order to clarify specific information. The footnotes at the end of each chapter indicate the sources used.

To dispel any possible misunderstanding, I must stress that I was allowed access to any file or document I requested, and that the research was facilitated by the exemplary co-operation of the ICRC’s Archives Division.

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I have had the privilege of serving the International Committee of the Red Cross as a delegate in the Middle East and Asia and, for short periods, in Europe and Africa. It was during these missions, face-to-face with the harsh reality of war and its effects, and the cruel plight of its victims, that the idea of this book was born.

Conceived from the standpoint of a former delegate, it is addressed, first of all, to colleagues at the ICRC; my hope is to give them—not a manual, nor a list of instant solutions—but a reference work and, through the information it contains, a source of guidance for them in determining their course of action.

I also hope that diplomats, officers of the armed forces and government officials, as well as volunteers and staff members of the National Societies and the Federation who find themselves working alongside the ICRC, will find the book useful.

The law of armed conflicts is not, unfortunately, taught as widely as it should be; it is hence all the more important to support university teachers and students who specialize in the subject. Their assiduous work will, hopefully, help to build a world of diminishing violence. May this book be of service to them in doing so.

Although my book is far longer than I had planned, I very much hope that it will appeal to Red Cross and Red Crescent volunteers, who are the lifeblood of the Movement, and to journalists and others who, without being humanitarian law specialists, are concerned by the problems of protecting human life and interested in the work of the Red Cross. With this in mind I have tried to limit the use of specialist terms, and have ruthlessly cut out obscure expressions which, too often and needlessly, deter people from reading academic publications.

In the course of my studies and research I have benefited from the full support, encouragement and advice of members of the International Committee and its staff. I must emphasize, though, that the work was undertaken at my own initiative and that my research was carried out with complete freedom. No grant or material support was given by the Committee or any other institution, nor was any requested. The ICRC gave me no instructions regarding my work and did not look at it before the final draft was ready.

This book does not necessarily reflect the opinions of the International Committee — on some points we disagree — and it should not be taken as an official ICRC point of view.

While my thanks go to all those who contributed to the writing of the book through their suggestions and comments, I must accept full responsibility for the opinions expressed and for any errors and omissions.

My last thought is for those who inspired this book: the victims of war, that endless procession of men, women and children, the vanquished, the exiled, refugees and prisoners. It is impossible to forget the agonized expressions of the wounded, the fear in the eyes of refugees, the defiance, apathy or
anguish in the faces of prisoners; the misery, and the shadow of death, in the pathetic gaze of a starving child.

Who could ever forget little Aishah, lying frail in her hospital cot, always alone and yet always smiling to mask her pain? I had walked past her more than a dozen times before I realized with shock and infinite sadness that both her legs had been severed by shrapnel.

François Bugnion
December 1991

Notes


3 ‘Legal personality’ is the capacity to be given rights and duties within a specific legal order, the capacity to maintain those rights, and the bearing of responsibility for any failure to perform those duties. ‘International legal personality’ is the capacity to possess rights and duties under international law, and the capacity to maintain those rights at international level.

4 Internal disturbances are characterized by phenomena such as riots, isolated and sporadic acts of violence or similar events. They are situations which do not amount to non-international armed conflicts as such, but where there exists a confrontation within the country, marked by a certain seriousness and acts of violence. To restore internal order, the authorities in power call upon extensive police forces, or even armed forces.

By internal tensions, we usually mean situations of serious tension (political, religious, racial, social, etc.); these situations – which might be a sequel to a civil war or to internal disturbances – present any one, if not all, of the following characteristics: suspension of fundamental judicial guarantees, the introduction of exceptional measures and the restriction of individual liberties, administrative detention, etc.

In short … internal disturbances exist when, in the absence of an armed conflict, the State uses armed force to maintain order; internal tensions exist when, in the absence of internal disturbances, force is employed as a preventive measure to maintain respect for law and order”, to quote the definition given by the ICRC (*The ICRC, the League and the Tansley Report, Considerations of the International Committee of the Red Cross and of the League of Red Cross Societies on the Final Report on the Reappraisal of the Role of the Red Cross*, unclassified document submitted to the Twenty-third International Conference of the Red Cross, Bucharest, October 1977, ICRC-League, Geneva, August 1977 [*The ICRC, the League and the Tansley Report*], mimeographed copy, p. 34).

In delimiting this study, the essential distinction is between non-international armed conflicts, on the one hand, and situations of internal disturbances or tension on the other. Although the Geneva Conventions and their Additional Protocols do not explicitly define these terms, a non-international armed conflict can be said to exist when there are serious armed clashes within a country and where the insurgents show a certain degree of organization.

"In Red Cross action, “to protect” implies preserving victims of conflicts who are in the hands of an adverse authority from the dangers, suffering and abuses of power to which they may be exposed, defending them and giving them support" said the ICRC in *The ICRC, the League and the Tansley Report*, p. 18. However, the definition put forward by the ICRC is too restrictive, as the protection of the Red Cross for the victims of armed conflicts is not limited to those who are in the power of an enemy.


The Statutes were first adopted by the Thirteenth International Conference at The Hague (1928), revised by the Eighteenth International Conference (Toronto, 1952), and again in Geneva (1986).

*The ICRC, the League and the Tansley Report*, p. 17.
The widespread return to peace that might justifiably have been expected with the end of the Cold War has unfortunately not materialized, and conflict has broken out in many places since the fall of the Berlin Wall and the demise of the Soviet Union. There has been war in Nagorny Karabakh, Abkhazia, Tajikistan and Chechnya, genocide and civil war in Rwanda, civil war in the Democratic Republic of the Congo, Burundi, Liberia and Sierra Leone, not to mention the tragic situations in Algeria and eastern Turkey, or the countless dramatic developments in the Yugoslav conflict. Other less recent conflicts have also continued to take their daily toll of victims, especially in Peru, Colombia, Angola, Sri Lanka, Cambodia and Afghanistan. It is all too clear, from a list of the wars and civil wars that have cast a pall over the world during the past eight years, why this book could not be revised to take account of events since the French version was finalized in December 1991. It would have been necessary to write another book.

There can be no doubt, however, about the conclusions expressed in it. On the contrary, recent conflicts have tended to confirm its analyses and the lessons learned, as the Gulf War (1990–1) did before them.

Several minor errors have been corrected in the English edition and certain figures brought up to date, but otherwise it is true to the original edition of 24 December 1994. The bibliography has been supplemented to give as complete an overview as possible of the works and articles dealing with the activities of the International Committee of the Red Cross for the victims of war.

Translation is a difficult art, for each language has a spirit of its own and concepts vary from one language to another, even when the two languages are as closely related as French and English. I would therefore like to express my deep gratitude to Edward Markee and Nicolas Sommer, who translated the manuscript undaunted by its length; to Patricia Colberg, who revised the entire translation; to Trisha Bennett Mayer, Stella Chan-Pasteur, Isabelle Vonèche, John Gurtwith and the staff members of the ICRC’s Archives Division, for their bibliographical and documentary research; and to Susan Mutti and Margarita Billon Darder for their invaluable support in coordinating the work. They all performed their duties with the greatest diligence, bringing to the delicate and demanding task of producing this edition their mastery of English and endowing it with the beauty and expressiveness of the language while remaining faithful to the French original.
No matter what care is taken, however, slight differences may exist between the two language versions of a text. Should the French and English versions of this book differ, the French version is authentic.

Finally, I would also like to express my gratitude for the help and courtesy of the staff of Macmillan Education and in particular to Mrs Shirley Hamber, freelance publisher, and to Mrs Janey Fisher, freelance editor.

It goes without saying that I alone am responsible for any mistakes or omissions.

François Bugnion
30 June 1999
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Actes du Comité international, 1871</td>
<td><em>Actes du Comité international de Secours aux Militaires blessés</em>. Imprimerie Soullier &amp; Wirth, Geneva, 1871</td>
</tr>
<tr>
<td>Bulletin international</td>
<td><em>Bulletin international des Sociétés de Secours aux Militaires blessés</em> (from 1869 to 1885), then <em>Bulletin international des Sociétés de la Croix-Rouge</em> (from 1886 to 1918)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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</tr>
<tr>
<td>Compte rendu ... 1863</td>
<td>Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28, et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne (Excerpt from Bulletin no. 24 of the Société genevoise d’Utilité publique). Imprimerie Fick, Geneva, 1863</td>
</tr>
<tr>
<td>Compte rendu ... 1864</td>
<td>Compte rendu de la Conférence internationale pour la Neutralisation du Service de Santé militaire en Campagne, réunie à Genève du 8 au 22 août 1864, handwritten copy in the ICRC library, reproduced in de Martens, Nouveau Recueil général de Traité, vol. XX, pp. 375–99</td>
</tr>
<tr>
<td>Documents ...</td>
<td>Documents relating to the work of the International Committee of the Red Cross for the benefit of civilian detainees in German Concentration Camps between 1939 and 1945. ICRC, Geneva, April 1975</td>
</tr>
<tr>
<td>Final Record 1949</td>
<td>Final Record of the Diplomatic Conference of Geneva of 1949, 4 volumes. Federal Political Department, Berne, 1949</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IFRCS</td>
<td>International Federation of Red Cross and Red Crescent Societies</td>
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<tr>
<td>International Committee</td>
<td>International Committee of the Red Cross</td>
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<tr>
<td>IRRC</td>
<td>International Review of the Red Cross</td>
</tr>
<tr>
<td>League</td>
<td>League of Red Cross Societies (from 1919 to 1983), then League of Red Cross and Red Crescent Societies (from 1983 to 1991), then International Federation of Red Cross and Red Crescent Societies</td>
</tr>
<tr>
<td>POWs</td>
<td>Prisoners of war</td>
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In accordance with a practice that dates back over 100 years, the name ‘International Red Cross’, as well as the simplified term ‘Red Cross’, has been used in this publication to designate the International Red Cross and Red Crescent Movement.
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BOOK ONE

FROM SOLFERINO TO HIROSHIMA

¡Caminante! No hay camino.
Se hace camino al andar.
Antonio Machado, Campos de Castilla
INTRODUCTION

More than any other body of rules, international law is marked by the historical process from which it has emerged. It is impossible to grasp fully the sense and the scope of a rule without first understanding the context in which it was established and that in which it was supposed to take effect. In the same way, it is impossible to understand an organization without seeking out its roots and examining the historical framework in which it developed. The intentions of its founders, the circumstances surrounding its creation, the accumulation of decisions which have made up its policies and traditions, the external forces that have sought to modify its procedures and basic doctrine, its successes and failures, its reappraisals and changes of direction – all these individual elements have to be taken into account in order to come to a complete understanding of the whole.

Organizations, like people, have a memory. The past influences the present which, in turn, colours our view of the past: these interactions cannot be ignored. Examining something purely in its current state would lead to serious errors of interpretation; it would make a mockery of the temporal dimension of human activity, distort the importance of the past and the historical perspective, and lead us to interpret the past with today’s criteria.

Before attempting to analyse the present state of any organization we must therefore try to reconstruct its past. While this is true for any organization, it is fundamental for the International Committee of the Red Cross, for it has no founding charter or predetermined mandate; its composition, duties, attributes and responsibilities result from a wealth of historical initiatives, decisions and coincidences.

It is essential, therefore, that we step back into history, and such is the aim of the first volume of this book.

However, my purpose is not to write the complete history of the ICRC. That would go beyond the scope of this book, and indeed would be superfluous, as two authoritative writers have already done so: in 1963, the late Pierre Boissier published From Solferino to Tsushima, the first volume of the Committee’s history; André Durand continued the study up to the end of the Second World War and published From Sarajevo to Hiroshima in 1978.

My objective is more modest, and consists of reviewing ICRC practice and the proceedings of the International Conferences to see how the Committee
has gradually acquired its duties and responsibilities for the protection of the victims of war.

Other activities of the ICRC – its contribution to the development of humanitarian law, its relations with National Societies and with their Federation, its peacetime activities – will be mentioned only in so far as they serve to enhance our understanding of the main subject.

Time is the historian’s domain; before seeking to reconstruct past events he must delimit the area he intends to explore.

The starting point is clear: the battle of Solferino, on 24 June 1859. Not that this should be taken – as people did in the last century – as the origin of humanitarian law; every civilization has imposed constraints upon acts of violence and in particular upon that institutionalized form of violence that we call war. Through the ages communities have created humanitarian rules of one kind or another, limiting the evils of war and protecting its victims. No period in history, and no civilization, can take sole credit for the ‘invention’ of humanitarian law. That being said, Solferino was unquestionably the inspiration for modern humanitarian law, enshrined in treaties, having a secular basis and aspiring to universality; and it is a matter of simple fact that that battle led to the foundation of the International Committee of the Red Cross, the subject of this book.

The outer limit is less obvious. Without any doubt, the capitulation of Germany and Japan, and the atomic bombs which wiped out Hiroshima and Nagasaki, were turning points in modern history. But for the International Committee, a war is not finished the moment the guns stop firing; its work continues for as long as there are prisoners to repatriate, families to reunite and missing persons to trace. The scope of this historical reconstruction is therefore extended to take into account the humanitarian problems remaining at the end of the Second World War.

The conflicts which followed 1945 form part of a new era, that of the dominance of the two superpowers and the former colonies’ accession to independence. This chapter of history is not yet complete – the conflicts that flared up in the Middle East, Kashmir, Indochina and Korea after the Second World War remain unresolved and we cannot yet stand back and see these events in their true historical perspective. Furthermore, we do not yet have access to the relevant public records, without which the historian risks going astray in the realm of pure conjecture. In these circumstances it would be rash to try to write the history of the ICRC since 1945.

Furthermore, the work which started at the end of the Second World War to revise and extend the humanitarian rules and the subsequent adoption of the four Geneva Conventions of 12 August 1949 must also be taken into account, for those Conventions are still in force and constitute to this day the fundamental norms for the protection of the victims of war, as well as the legal basis for the ICRC’s work.

The ICRC’s activities during the post-1949 conflicts will therefore be examined from an analytical viewpoint, looking at events within the general
framework of contemporary international humanitarian law. This will be the subject of Volume II.

For these reasons there is no need to extend the historical narrative beyond the activities stemming directly from the Second World War.

Notes

1 Collective memory, like that of individuals, is always selective and often unreliable – but this does not alter the fact that a myth, a misconception, even an outright lie can influence behaviour just as much as the truth.
CHAPTER I

AFTERMATH OF A BATTLE

Im Anfang war die Tat.
Goethe, Faust, verse 1237

The early history of most institutions has been blurred by the passage of time. Even when their initial form can be clearly discerned, it often bears little resemblance to the institution as we know it today.

The International Committee of the Red Cross is a striking exception – it can be traced back to a precise date, and its origins are relatively well known. This first phase is worth considering in detail, because it casts light on the entire subsequent development of the Red Cross and explains the particular position of the International Committee itself.

On 24 June 1859 the armies of France and Sardinia engaged Austrian forces near the northern Italian village of Solferino. This decisive battle in the struggle for Italian unity was also the most horrific bloodbath Europe had known since Waterloo: in ten hours of fierce fighting, more than 6000 soldiers were killed and some 40,000 wounded.1

The medical services of the Franco-Sardinian armies were totally overwhelmed, exposing the negligence of the supply corps: the French army had more veterinary surgeons than doctors; transport was woefully inadequate; crates of field dressings were dumped far from the front line and sent back to Paris, unopened, at the end of the campaign. General de la Bollardièrè, French Quartermaster-General, reported that it took six days to bring in 10,212 wounded from the field.2

Helped by their comrades, leaning on makeshift crutches or on their rifles, the wounded soldiers staggered to nearby villages in search of food, water, first aid and shelter. More than 9000 of them came to the small town of Castiglione where invalids soon outnumbered the able-bodied.3 The wounded were everywhere – in houses, barns and churches, or filling up the squares and lanes.

On the evening of 24 June a young man from Geneva, Henry Dunant, arrived in Castiglione. A banker by profession, he was travelling on urgent private business and had no particular medical knowledge, but he was too compassionate to be able to disregard the pain and distress around him: for several days and nights he worked at the ‘Chiesa Maggiore’, a church sheltering more than 500 wounded. He gave them water to ease their thirst; he cleaned their wounds, changed dressings; he sent his coachman to the city of Brescia to buy cloth for dressings, pipes and tobacco, herbal infusions and fruit; he enlisted the aid of charitable local women to tend the injured and
dying; he wrote to his friends at home to ask for supplies. In short, he set an example and tried to organize help so as to alleviate, as far as possible, the suffering which confronted him.

Dunant returned to Geneva on 11 July – the very day on which the Italian campaign ended. Not for the first time, he was dogged by financial difficulties arising from his business interests in Algeria.

Had that been the end of his involvement with the wounded of Solferino, his name would have been quickly forgotten, along with all those other people of good will who showed equal dedication at Castiglione, Brescia and Milan. Dunant, however, was haunted by what he had seen. In 1861 he decided to withdraw from the world and shut himself away in Geneva where, for a year, he studied accounts of the Italian campaign and wrote a book which was to prove a landmark: *A Memory of Solferino*.4

The book is in two parts: the first gives a description of the battle, an epic account in the greatest tradition of military historiography. But suddenly the tone changes and the hidden side of war is stripped bare in his grim portrayal of the ‘Chiesa Maggiore’ where the wounded and dying lie crowded together; he tells of the squalor, the pools of blood, the nauseating smells, the swarms of flies settling on open wounds, the mouths of the wounded deformed in cries of agony, the pain and neglect, terror and death ….

But Dunant was not content merely to describe the horrors of war: he ended the book by asking two questions, which were in effect appeals to the conscience:

But why have I told of all these scenes of pain and distress, and perhaps aroused painful emotions in my readers? Why have I lingered with seeming complacency over lamentable pictures, tracing their details with what may appear desperate fidelity?

It is a natural question. Perhaps I might answer it by another:

Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?5

This simple question was the inspiration for the founding of the Red Cross.

There was more, however: for these volunteers to be able to carry out their relief activities near the front lines, they had to be recognized and respected. This led to the second appeal:

On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet at Cologne or Châlons, would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?6

This question was to result in the adoption of the original Geneva Convention.
A Memory of Solferino was published at the author’s expense in Geneva, in November 1862; 1600 copies were printed, and on the title page was written: ‘Not to be sold’. The book was an open letter to world leaders and opinion makers, and Dunant sent it to sovereigns and statesmen, renowned military commanders, doctors, writers and philanthropists.

The book had an immediate impact. Two further editions were printed in the months that followed and sold to the public, and translations appeared in English, Dutch, Italian, Swedish, Russian, Spanish and – in three separate editions – in German. But what mattered, apart from the number of readers, was the level of the readership: messages of support reached Dunant in their hundreds from influential people throughout Europe. Dunant had succeeded in creating a tidal wave of enthusiasm for his idea: like Uncle Tom’s Cabin, published a decade earlier, A Memory of Solferino was one of those books which shook contemporary society and left their mark on history.

Enthusiasm, however, counts for nothing if it does not lead to action: simply proposing something, however useful it might be, will not in itself guarantee the desired effect.

At this point a fellow-citizen of Dunant stepped in: Gustave Moynier, lawyer and chairman of a local charity, the Geneva Public Welfare Society. Moynier decided to have Dunant’s book – and in particular its concluding questions – discussed at the Society’s meeting on 9 February 1863.

If the minutes of this meeting are to be believed, members were sceptical about Dunant’s ideas. It is easy to imagine that this group of people, meeting in a small provincial city, were reluctant to get involved with proposals which aimed, in the final analysis, to alter military practice in war. Nevertheless the Society decided, at Moynier’s prompting, to submit a paper developing Dunant’s ideas to an international welfare congress due to be held later that year in Berlin. Five members were appointed to the drafting committee: Moynier, Dunant, General Dufour and two doctors, Appia and Maunoir.

The International Committee had come into being.

Notes

5 Ibid., p. 115.
6 Ibid., p. 126.
Aftermath of a Battle

10 Moynier was to write later: ‘How could it be imagined that an association modestly committed to dealing with local affairs, in a small country and having no means of action outside its own sphere, could take up the cause of this vast endeavour about which it was being consulted?’: Gustave Moynier, La Croix-Rouge, Son Passé et son Avenir, Sandoz & Thuillier, Paris, 1882, p. 13.
11 There was initially a great deal of uncertainty as to what this committee should be called. The following designations are recorded:
   • Comité genevois de secours pour les militaires blessés (Geneva Committee for Aid to Wounded Soldiers), term used in the invitation it sent out on 1 September 1863;
   • Comité international de secours pour les militaires blessés (International Committee for Relief for the Wounded Soldiers), Circular of 12 July 1864;
   • Comité international de secours aux militaires blessés (International Committee for Relief to Wounded Soldiers), term used between 21 October 1868 (15th Circular) and 20 June 1874 (30th Circular).
   Apart from these, the expressions ‘Geneva Committee’, ‘Geneva International Committee’ and ‘Committee of Five’ were frequently used.
   It was during its meeting on 20 December 1875 that the Committee adopted the name ‘International Committee of the Red Cross’, which subsequently appeared on all ICRC documents beginning with the 31st Circular to Central Committees of the National Red Cross Societies dated 10 February 1876.
   In this book the above terms will be used as appropriate according to the period referred to. More details on this subject may be obtained from the manuscript of Perceval Frutiger’s study: ‘Documentation sur les origines du signe de la Croix-Rouge et diverses questions connexes’, December 1948, ICRC Archives, file CR 48.

References


Other personal accounts of the foundation and early years of the Red Cross include: Henry Dunant, Mémoires, edited by Bernard Gagnebin, Henry Dunant Institute, Geneva, and Éditions L’Age d’Homme, Lausanne, 1971; Gustave Moynier, La Croix-Rouge, Son Passé et son Avenir, Sandoz & Thuillier, Paris, 1882.

The ICRC and the Protection of War Victims

CHAPTER II

THE FOUNDATION OF THE RED CROSS AND THE FIRST GENEVA CONVENTION

Lo que cambia el mundo
es la fe y no la fuerza.
José Pijoan, Historia del Mundo,
5th ed., Salvat Editores,

The five-member committee formed by the Geneva Public Welfare Society held its first meeting on 17 February 1863. Strictly speaking, its mandate was no more than to prepare a paper for presentation to the International Welfare Congress to be held later in the year; but its members were already looking further ahead:

[M. Moynier] furthermore proposed, and M. Dunant seconded, that the Sub-committee should declare itself constituted a ‘Permanent International Committee’.

The proposal was adopted unanimously. On a show of hands General Dufour was elected President of the said Committee, which would thus continue to exist as an International Committee for the Relief of Wounded in the event of War, after its mandate from the Geneva Public Welfare Society had expired.2

This, the Committee’s first decision, may appear surprising, as it went far beyond the mandate given by the Geneva Public Welfare Society. It can be explained, though, by the objectives which the Committee set itself and which are made remarkably clear from the very start.

To understand these objectives, the situation of wounded soldiers and of the military medical services in the mid-nineteenth century must be borne in mind. It was generally accepted that wounded or sick soldiers should be collected and cared for without distinction as to the side they were on. In practice, however, they were usually left to fend for themselves.

Despite the progress made in medicine, military medical services were falling apart; the French Revolution was largely to blame. Under the Ancien Régime, a first-class medical corps was seen as the best way of maintaining the royal armies’ limited strength. Because they were made up of professional soldiers who had to be paid, armies were expensive and had to be properly looked after.3 The Hôtel des Invalides in Paris, built as a home for the sick
and wounded, provides striking proof of the concern of Louis XIV for those members of his armed forces who had served him faithfully.

By introducing conscription, the Revolution relegated the medical services to the bottom of the quartermaster-generals’ list of concerns. Losses on the battlefield could be made up by new levies of troops – surgery thus became less vital as a means of conserving the army’s strength. The medical services were neglected, even though the increased size of the armies resulted in a greater number of casualties.

For all their professional skills, Napoleon’s field surgeons were unable to create a medical service to meet the needs of his Grande Armée. Furthermore, the service such as it existed was disbanded at the restoration of the monarchy in 1814; after Bonaparte’s final defeat Europe was to enjoy a long period of peace, and military medical services were reorganized according to peacetime needs.4

Quite obviously, there is no similarity between the needs of an army in barracks and one in the field. But once war has broken out, it is too late to start training additional surgeons and nurses; disaster becomes inevitable.

The total inadequacy of the medical services was so evident that at the conference of October 1863 – to which the Committee of Five invited representatives of the European States – it was freely acknowledged by all the generals and military physicians assembled there. Only the British delegate could claim otherwise.5 Doctor Loeffler, Chief Physician of Prussia’s Fourth Army Corps, even declared that any attempt to remedy the situation would be incompatible with the proper management of national finances:

It would be at odds with sound national economic principles to devote on a continuous basis and in times of peace the degree of attention and development to medical services that the State demands in all war-related activities. Moreover, the history of all the major conflicts of our century has demonstrated that, the moment war breaks out, the authorities are unable to develop the assistance services sufficiently and quickly enough to respond to anticipated needs.6

This is tantamount to maintaining that medical services had to be neglected in peacetime, whatever the price which had to be paid in times of war.

The results of this policy were clear: wound for wound, the chances of survival for soldiers serving under Napoleon III were far smaller than for their counterparts in the army of Napoleon I – and they in turn were in a worse position than the soldiers of Louis XV.7

But this was not all. Under the Ancien Régime, it was usual for armies to agree on the neutrality of the medical services: before joining battle, generals would inform each other of the location of their field ambulance units, which from then on would be regarded as immune from attack. This sensible precaution allowed medical services to be positioned in the immediate vicinity of the battlefield.8 This practice, of which the members of the Geneva Committee were unaware, was abandoned at the time of the French Revolution. The consequences are easy to imagine: to protect ambulance
stations from enemy fire, they were established well away from the battlefield, even though there were no proper means of transporting the wounded. At the battle of Solferino the advanced hospitals were at Brescia, more than twelve miles away, while the base hospitals were at Milan! The seriously wounded had no hope of getting there. Also, the ambulances were poorly marked, with each country using a flag of a different colour: white for Austria, red for France, yellow for Spain, and black for other countries. Soldiers would at best know only the markings of their own ambulances, and therefore would be likely to destroy those of the enemy simply because they were unable to recognize them. At a distance it would be impossible to distinguish wagons of the medical corps from others in a convoy, and so they could be considered as legitimate targets. Nor were there any clearly visible markings on medical corps uniforms: a very close look at a surgeon’s tunic was needed to make out the caduceus, or snake-entwined staff – the distinctive emblem of the medical profession – on his gilt buttons. In those circumstances, going to collect the wounded before the fighting had stopped was out of the question.

Furthermore, there was no agreement on the status of medical personnel, and during the Italian campaign, captured Austrian doctors were held in the Citadel at Milan. They would have been more useful in the hospitals, where they could have assisted their French colleagues. It took a personal appeal by Baron Larrey, Surgeon-General of the French army, to secure their release from prison.

The lack of agreement on this question could have dire consequences: during a retreat, military doctors had to choose between running away and being captured. If they chose the former, they left the wounded with faint hope of being found and looked after by the enemy’s medical services before they died of thirst, hunger or lack of care.

For the same reasons the civilian population hesitated to help the wounded. Apart from the fear of looting, people were afraid, in the event of an enemy counter-attack, of being accused of having looked after the ‘wrong’ casualties. The wisest thing was to stay at home and to keep the door firmly shut.

Such was the situation that Dunant had seen in Italy and had described in A Memory of Solferino; it had been the start of his crusade.

To put this scandalous state of affairs to rights, Dunant’s idea was to form relief societies which would rely on private support. So as to be able to act in good time, the societies would be set up on a permanent basis. They would not wait for hostilities to start before establishing contacts with the military because the authorities would then be too busy fighting the war to discuss other matters; therefore, the governments had to be associated with efforts to help the wounded from the outset. When war broke out, the societies would send ‘qualified volunteers’ to follow the armies and place themselves at the disposal of the military commanders whenever they were needed; they would care for the wounded of all sides without distinction.
To be able to work safely and effectively, the volunteers had to be recognizable as such. They therefore had to be given a distinctive sign:

... a badge, uniform or armband might usefully be adopted, so that the bearers of such distinctive and universally adopted insignia would be given due recognition.14

But this was not enough; what point was there in sending volunteer nurses after the armies if medical personnel remained exposed to enemy fire, and if supplies could be seized and diverted? All these personnel had to be shielded from the hostilities:

Finally, M. Dunant particularly underlined the hope he expressed in his book *A Memory of Solferino* that the civilized Powers would subscribe to an inviolable, international principle that would be guaranteed and consecrated in a kind of concordat between Governments, serving thus as a safeguard for all official or unofficial persons devoting themselves to the relief of victims of war.15

The question of according neutral status to medical services and volunteer nursing staff is thus raised.

It seems that Dunant was then alone in regarding their neutral status as something that could be achieved.16 However, he deftly succeeded in forcing the hand of his colleagues and his persistence led, ultimately, to the adoption of the Geneva Convention.17

So from that first meeting, the Committee’s ‘grand design’ was remarkably clear and coherent. In fact, all these objectives had been stated, as either embryonic or fully-fledged ideas, in the closing pages of *A Memory of Solferino*.  

But the question has to be asked: to what extent were these ideas really new? The Committee’s success clearly showed that it was on favourable ground. Marx was not mistaken when he wrote: ‘It is not enough […] that thought should try to realize itself; reality itself must strive towards the thought’.18

So the ideas formulated by the Committee were already in the air: during the Crimean war and the Italian campaign numerous committees had been formed to raise funds and send assistance to the victims; many volunteers, like Dunant, had set to work spontaneously to help the wounded.19

The proposal that ambulances be declared neutral likewise already had eminent supporters – Dr Palasciano, in Naples (April 1861), and Henri Arrault, in Paris (June 1861)20 – whilst the adoption of a standardized distinctive sign for the medical services of all armies had in fact been advocated by Dr Loeffler as early as 1859.21 And it was around the same time that the American lawyer Francis Lieber drew up his *Instructions for the Government of Armies of the United States in the Field*, which resembled the International Committee’s programme in more ways than one.22 Many other examples of this concurrent thinking could be given.
That being said, the contribution of the Committee of Five was decisive, for three reasons:

- The Committee brought together in one coherent plan of action a number of different but interdependent proposals which, individually, would have had only a relatively small impact on the situation of the wounded. These included suggestions for voluntary nurses, a distinctive sign, the neutrality of ambulances, etc.

- From the start, the Committee set its sights on achieving something lasting that went far beyond the charitable groups formed spontaneously after a battle in order to raise funds for relief (which, lacking proper organization, generally arrived too late). The new committees would be permanent and would prepare for their task in advance, in peacetime. In the same way, there could no longer be any question of those short-lived agreements on the neutrality of ambulances which were sometimes reached on the eve of a battle – only to lapse when the fighting was over. There had to be a cast-iron treaty, agreed upon in peacetime and valid for all future conflicts. This was the only means of guaranteeing the safety of ambulances from the opening of hostilities until the end of the war.

- Finally, the Committee was determined that its work should have an international basis: national committees would be united by an international bond of solidarity. An ‘international principle, sanctioned by a Convention inviolate in character’ must link as many states as possible. Only in this way would the wounded, from whatever nation, be assured of care.

Furthermore the Committee proved its theories through action: just as Diogenes demonstrated movement by getting up and walking, the Committee took the necessary initiatives to transform its ideas into reality. In doing so it was ahead of its time – and this was – and remains – its first title to legitimacy.

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The least contested of the Committee’s objectives was the creation of societies to help the wounded. So the obvious first move was to rally the widest possible backing for it.

The Geneva Committee had never sought to retain direct control over its project. On the contrary, it felt that the work had to be both international and decentralized: international, in that the relief societies would be established in as many countries as possible and would all adhere to a number of common principles needed to maintain solidarity; and decentralized, in that each society would, within the framework of those principles, be organized according to local customs and traditions.

The Committee was not setting out to build an empire but to call for adherents to a cause; it did not want to be the architect of an organization which it would direct, but sought to promote the formation of societies in
every country which would be directed by national committees. Support therefore had to be enlisted in the capitals of the various countries; at the same time, though, general guidelines had to be established.

The Geneva Committee expected to launch the idea of volunteer nursing staff at the International Welfare Congress to be held in Berlin, but during the summer of 1863 it was learned that the meeting would not take place.

Without hesitation the Committee decided to convene an international conference in Geneva, under its own auspices, to discuss ways of remedying the inadequacies of the military medical services. On 1 September it sent an invitation to every European government, as well as to a number of well-known military commanders, physicians and philanthropists. Attached was a ‘draft concordat’ containing ten articles which set out the general principles of the organization that was to be created; the question of neutral status for medical personnel and the wounded, however, was not mentioned. The conference was scheduled for the following month.

In the time available to him, Dunant decided to visit Germany. His purpose was twofold: to go to an International Statistical Congress that was taking place in Berlin and sound out the reaction to the circular of 1 September; and to encourage the main German states to send representatives to the October meeting in Geneva.

With the support of Dr Basting, a leading Dutch military surgeon, Dunant was able to address the congress and outline his proposals. These were warmly received, not only regarding the question of volunteer nursing staff, but even more so that of neutral status for ambulances.

This prompted Dunant to send out a new circular from Berlin on 15 September, in the Geneva Committee’s name; in it he proposed that military medical personnel and recognized voluntary helpers be regarded as neutral. By doing so, Dunant had presented the Committee with a fait accompli.

The conference was opened in Geneva on 26 October 1863 by General Dufour. Thirty-six people attended, including the five members of the Committee: eighteen were sent by fourteen governments, to listen and to report back to their capitals; six represented various organizations; seven were there in a private capacity.

The hybrid composition of the group should not be seen as odd – in fact it was quite logical from the Committee’s point of view: the objective was not to create a new branch of the civil service, but to form relief societies which would mobilize private support. But the societies could not send volunteer nursing staff to the front without the protection of their respective governments: as their support had to be requested in advance in peacetime, those governments had to be associated with the project from the start. This explains the mixture of public and private participation at the 1863 Conference; indeed, all International Conferences of the Red Cross since 1863 have been attended by delegations from the National Red Cross and Red Crescent Societies as well as representatives of the states party to the Geneva Conventions.
As the basis for its discussion, the Conference considered the draft convention drawn up by the Geneva Committee. Debate centred on the organization of the national committees and, in particular, on the feasibility of sending volunteer nurses to follow the armies.\footnote{32}

Three points emerged concerning the position of the International Committee:

- the Committee did not seek to obtain a dominant position within the new institution – it presented itself simply as the promoter of an idea. This position was made clear by Moynier himself, speaking for the Committee: 'We shall be content to have promoted an institution which will gradually expand, and whose charitable work will certainly elicit universal support'.\footnote{33}
- the Geneva Committee was confirmed, without any discussion, as the central point for the exchange of correspondence between the national committees.\footnote{34}
- The Committee’s provisional nature seems to have been generally accepted, the view being that when the national committees were formed, it would no longer have any raison d’être. One of the Netherlands’ delegates, Captain Van de Velde, put it this way: ‘The provisional position of the Geneva Committee will cease when the committees in other countries have been formed’.\footnote{35}

The conference ended on 29 October, after adopting ten resolutions which constituted the foundation of the Societies for Relief to Wounded Soldiers – the future Red Cross and Red Crescent Societies. The question of neutral status for ambulances was also discussed; deciding, quite correctly, that a matter of international law of this kind could be settled only by a diplomatic conference,\footnote{36} the delegates confined themselves to making certain recommendations to governments.

The adoption of these resolutions and recommendations was a milestone in the history of the law of armed conflict. As Boissier aptly puts it:

[They] constitute the fundamental charter for the relief of persons wounded in war. They are among the few fundamental texts which have positively influenced the destiny of man. They have not eliminated war but they have diminished its hold over man and have deprived it of innumerable victims.\footnote{37}

In the annals of mankind they were, he wrote, counter-evidence in man’s favour. The text is as follows:

\textbf{RESOLUTIONS OF THE INTERNATIONAL CONFERENCE IN GENEVA}

The International Conference, desirous of coming to the aid of the wounded should the Military Medical Services prove inadequate, adopts the following Resolutions:
Article 1: Each country shall have a Committee whose duty it shall be, in time of war and if the need arises, to assist the Army Medical Services by every means in its power. The Committee shall organize itself in the manner which seems to it most useful and appropriate.

Article 2: Any number of Sections may be formed to assist the Committee, which shall be the central directing body.

Article 3: Each Committee shall get in touch with the Government of its country, so that its services may be accepted should the occasion arise.

Article 4: In peacetime, the Committees and Sections shall take steps to ensure their real usefulness in time of war, especially by preparing material relief of all sorts and by seeking to train and instruct voluntary medical personnel.

Article 5: In time of war, the Committees of belligerent nations shall supply relief to their respective armies as far as their means permit; in particular they shall organize voluntary personnel and place them on an active footing and, in agreement with the military authorities, shall have premises made available for the care of the wounded.

They may call for assistance upon the Committees of neutral countries.

Article 6: On the request or with the consent of the military authorities, Committees may send voluntary medical personnel to the battlefield where they shall be placed under military command.

Article 7: Voluntary medical personnel attached to armies shall be supplied by the respective Committees with everything necessary for their upkeep.

Article 8: They shall wear in all countries, as a uniform distinctive sign, a white armlet with a red cross.

Article 9: The Committees and Sections of different countries may meet in international assemblies to communicate the results of their experience and to agree on measures to be taken in the interests of the work.

Article 10: The exchange of communications between the Committees of the various countries shall be made for the time being through the intermediary of the Geneva Committee.

Independently of the above Resolutions, the Conference makes the following Recommendations:

A. that Governments should extend their patronage to Relief Committees which may be formed, and facilitate as far as possible the accomplishment of their task;

B. that in time of war the belligerent nations should proclaim the neutrality of ambulances and military hospitals, and that neutrality should likewise be recognized, fully and absolutely, in respect of official medical personnel, voluntary medical personnel, inhabitants of the country who go to the relief of the wounded, and the wounded themselves;

C. that a uniform distinctive sign be recognized for the Medical Corps of all armies, or at least for all persons of the same army belonging to this Service; and
that a uniform flag also be adopted in all countries for ambulances and hospitals.38

The International Conference of October 1863 thus gave the Geneva Committee a mandate (Resolution 10); it was limited in scope, covering only the exchange of communications between the national committees, and provisional in nature, for they would no longer need to communicate via an intermediary once they were duly formed and capable of doing so directly. But it was enough to endow the Committee of Five with a new authority: with this mandate, it could speak in the name of the conference.

However, there was rather more to it than that: the examination of a legal document should not be limited to what the text actually says – what it does not say is also important.

The Resolutions and Recommendations of the conference failed to settle two important points:

- ‘Each country shall have a Committee …’ – easier said than done! The course was set, but there was still a long way to go in forming the committees, in approaching governments for support.
- The granting of neutral status to medical personnel and the wounded was no more, at that stage, than a wish expressed by an international conference without any legal authority. To transform it into reality there had to be a legal rule, as part of a treaty.

Reading between the lines of the 1863 text, we see that there was work still to be done. This was to fall on the shoulders of the International Committee.39

Bolstered by the success of the conference and the new authority it had been given, the Committee set about tackling these tasks.

In the following months, the first relief societies were founded: Württemberg, the Grand Duchy of Oldenburg, Belgium, Prussia.40 From Geneva, the Committee spurred on the conference participants, encouraging them in their efforts to create national committees, asking for government support, sending out copies of the conference proceedings – in short, it tried to sustain, in the various capital cities, the enthusiasm which had inspired the drafting and adoption of the conference resolutions.41

At the same time, the Committee was discussing how to bring about a diplomatic conference which would transform the October Recommendations into treaty-based rules, binding on governments. Beginning on 15 November, it initiated consultations to this effect;42 it also sought the support of a government which would agree to convene such a conference.
Clearly, the Committee saw two important fields of activity opening before it, of almost frightening proportions. However, a new impetus to its work was shortly to come from a quite different, and unexpected quarter.

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On 1 February 1864 Prussian and Austrian troops crossed the Eider river and invaded Denmark. Ostensibly, this was of no concern to the Geneva Committee, which had no authority to intervene on the battlefield; the Committee’s mission had been to promote an idea, and the recently adopted Resolutions assigned responsibility for relief activities to the national committees.

Humanitarian action, however, like war itself, has its own momentum and once a commitment has been made it is hard to escape from it. The Committee very soon decided to send two delegates to the scene. The purpose of their mission was twofold: to give whatever help they could to the wounded and to see how the Resolutions could be put into effect – in other words, assist, observe and report back.43

There was however a further undeclared aim in sending two delegates to the war front. The delegates’ mission reports were published by the Committee in a book entitled *Secours aux Blessés*;44 this also included an historical introduction reproducing Dr Brière’s study on the *ad hoc* agreements reached in the eighteenth century to declare ambulances neutral. The reports were followed by an article, by Dr Maunoir, on the work of the voluntary relief committees during the American Civil War, showing the enormous achievements of the Sanitary Commission.

This unusual step, of publishing four apparently unrelated documents under a very general heading – *Aid for the Wounded* – seems intended to reinforce the Committee’s argument, to justify its proposals as not only sound in principle but also feasible in practice. To those who accused the Committee of daydreaming, Moynier and his colleagues replied by giving hard facts.

We shall return to the Committee’s baptism of fire later on. Here it is cited in passing to illustrate the essential part played by practical experience in the development of humanitarian law. As in the case of Solferino, action preceded regulation.

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The Committee had a further reason for providing such evidence. A difficult challenge lay ahead: preparations for a diplomatic conference at which its proposals were to be considered not by a group of presumably well-meaning philanthropists, who needed little winning over, but by official envoys whose primary concerns were for their countries’ national interests. The Committee’s plan had to be presented in such a way as to preclude any objections.
As the Committee itself could not convene such a conference, it had to receive the support of a government. And while it hoped the meeting could take place in Geneva, it felt that it needed to be called by a major power. Writing in those terms, it first contacted Paris.45

The French government passed the ball to the authorities in Berne: in a letter dated 21 May 1864, it said: ‘As the meeting will take place within the Swiss Confederation, diplomatic usage dictates that the official invitations to the various governments should be addressed by the Federal Council …’ 46

Why did Paris step aside in favour of Berne? Was it really in order to respect diplomatic practice as M. Drouyn de Lhuys, the French Foreign Minister, indicated? Was it perhaps out of reluctance to get involved in a rather uncertain venture? Or did France believe it wiser for a small country, whose status of permanent neutrality prevented it from becoming involved in Europe’s disputes, to take the initiative of organizing a conference whose aim was to enshrine the neutrality of medical personnel?47

The official records give no definite answer. However, that letter of 21 May marks the start of the close association between the Swiss government and international humanitarian law.

After being approached by the International Committee,48 Berne sent an invitation, dated 6 June 1864, to all the governments of Europe (including the Ottoman Empire), as well as to the United States, Brazil and Mexico.49

The International Conference for the Neutralization of Medical Personnel in the Field took place from 8 to 22 August 1864, in the presence of delegates from 16 nations.

Moynier and General Dufour took part as members of the Swiss delegation, with Dufour presiding over the meeting. The other members of the Geneva Committee were allowed to sit in on the discussions, as non-participating observers. Dr Brière was appointed secretary.50

This was a Diplomatic Conference with a difference: its purpose was not to reach a post-conflict settlement, nor to mediate between opposing interests, but to lay down general rules for the future. This was clearly summarized in the Swiss delegation’s report to Berne:

As is rarely the case in a diplomatic congress, there was no question of a confrontation over contradictory interests, nor was it necessary to reconcile opposing requests. Everyone was in agreement. The sole aim was to reach formal agreement on a humanitarian principle which would mark a step forward in the law of nations, namely the neutrality of wounded soldiers and of all those looking after them. This was certainly the wish expressed by the Conference of October 1863 and was the starting point for the 1864 discussions.51

The International Committee had prepared a draft convention which was adopted as the basis for discussion.52 The only point on which views diverged was that of neutral status for volunteer medical personnel; the French delegates, in particular, said they had no authority to sign a convention mentioning voluntary nurses, whereas other delegations wanted the volunteers to be duly protected. The conference finally agreed on a compromise: since
voluntary nurses would be subject to military discipline, they would be considered part of the military medical services, thus ensuring their neutrality even though they were not specifically mentioned in the convention.53

Practically speaking, the result was the same; but from a legal point of view, the compromise meant that the convention gave relief committees and their volunteers no recognized, independent status. As for the International Committee, neither its position nor its role were discussed.54

The Geneva Convention was signed on 22 August 1864. No other legal text had ever brought such influence to bear on the relations between opposing parties in wartime. The text is as follows:

CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD

Article 1: Ambulances and military hospitals shall be recognized as neutral and, as such, protected and respected by the belligerents as long as they accommodate wounded and sick.

Neutrality shall end if the said ambulances or hospitals should be held by a military force.

Article 2: Hospital and ambulance personnel, including the quartermaster’s staff, the medical, administrative and transport services, and the chaplains, shall have the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted.

Article 3: The persons designated in the preceding Article may, even after enemy occupation, continue to discharge their functions in the hospital or ambulance with which they serve, or may withdraw to rejoin the units to which they belong.

When in these circumstances they cease their functions, such persons shall be delivered to the enemy outposts by the occupying forces.

Article 4: The material of military hospitals being subject to the laws of war, the persons attached to such hospitals may take with them, on withdrawing, only the articles which are their own personal property.

Ambulances, on the contrary, under similar circumstances, shall retain their equipment.

Article 5: Inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer.

The presence of any wounded combatant receiving shelter and care in a house shall ensure its protection. An inhabitant who has given shelter to the wounded shall be exempted from billeting and from a portion of such war contributions as may be levied.
Article 6: Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.

Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties.

Those who, after their recovery, are recognized as being unfit for further service, shall be repatriated.

The others may likewise be sent back, on condition that they shall not again, for the duration of hostilities, take up arms.

Evacuation parties, and the personnel conducting them, shall be considered as being absolutely neutral.

Article 7: A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. It should in all circumstances be accompanied by the national flag.

An armlet may also be worn by personnel enjoying neutrality but its issue should be left to the military authorities.

Both flag and armlet shall bear a red cross on a white ground.

Article 8: The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.

Article 9: The High Contracting Parties have agreed to communicate the present Convention with an invitation to accede thereto to Governments unable to appoint Plenipotentiaries to the International Conference at Geneva. The Protocol has accordingly been left open.

Article 10: The present Convention shall be ratified and the ratifications exchanged at Berne, within the next four months, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the Convention and thereto affixed their seals.

Done at Geneva, this twenty-second day of August, in the year one thousand eight hundred and sixty-four.

As 1864 drew to a close, the members of the International Committee were able to take stock of their achievements since that first meeting on 17 February the previous year. They certainly had reason to feel satisfied.

The October 1863 Conference had laid the foundations for the relief societies; since then, several national committees had been formed in numerous states – in Württemberg, Oldenburg, Belgium, Prussia, Denmark, France, Italy, Mecklenburg-Schwerin, Spain, Hamburg and Hessen. And during the war over Schleswig-Holstein, the Prussian Society had actually provided assistance to wounded soldiers, showing that the 1863 Resolutions were far from unrealistic. The initial idea was becoming a reality.
The Geneva Convention had become part of the law of nations, and within four months it had been ratified by France, Switzerland, Belgium, the Netherlands, Italy, Spain, Sweden and Norway, Denmark and the Grand Duchy of Baden.

So the Committee’s objectives were well on the way to being achieved. With splendid enthusiasm, the young relief societies had set to work and would soon have created a close network of national committees and local branches throughout Europe. Governments, too, were eagerly ratifying the Geneva Convention, which before long would have attained an unprecedented level of universal acceptance.

The five members of the Committee could look forward to the moment – perhaps not far off – when they could stand down, having accomplished more than they had dared to hope. They had lit a beacon which in time would cast its light over the whole world; they themselves could make a graceful exit – or so they thought.

They had not, however, counted on the fact that the very success of their venture would make the Committee as essential for its continuation as it had been for its inception. The new National Societies needed some kind of central body to watch over the general interests of the movement, a body that would be able to maintain links between national committees, even in situations of war where direct links might be severed just when circumstances – and the interests of the wounded – called for co-operation.

The implementation of the Geneva Convention also called for the intervention of a neutral intermediary to see that the humanitarian principles embodied in the new treaty were respected, and to be of discreet but efficient service to the belligerents in its application. In the political system of the time, no other body existed to fill this role.

The Geneva Committee was nothing more than a private association formed by five like-minded people. It had no recognized status on the international scene. Yet while its creation was a result of personal initiative, the Committee’s future activities were to depend on outside forces of which it was not yet aware, but which were soon to become apparent, for the guns had again spoken.

Notes

1 The notebook containing the minutes of the first seven meetings of the International Committee was found among Dunant’s papers after his death, and published by Jean S. Pictet under the title: ‘Documents inédits sur la fondation de la Croix-Rouge, Procès-verbaux du Comité des Cinq’, Revue internationale de la Croix-Rouge, no. 360, December 1948, pp. 861–79 (the English translation: ‘The foundation of the Red Cross: Some important documents’, appeared in the International Review of the Red Cross, no. 23, February 1963, pp. 60–75).

2 Ibid., p. 865 (IRRC, no. 23, February 1963, pp. 63–4). General Dufour was succeeded as President of the Committee by Gustave Moynier on 13 March 1864 and was given the title...
of Honorary President. Moynier presided over the Committee until his death on 21 August 1910. Dunant was the Committee’s Secretary until he resigned on 25 August 1867.


5 *Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne*, Imprimerie Fick, Geneva, 1863, pp. 31–76 (hereinafter *Compte rendu 1863*). Britain was then the only country to have a military medical corps worthy of the name; the disasters of the Crimean War – and the example of Florence Nightingale – had had a salutary effect.

6 *Ibid*, p. 33, quoted by Boissier (*History of the International Committee*, pp. 74–5) who further states: ‘It was precisely this gap between the peacetime complement of medical units and the needs in times of war that the Geneva Committee was seeking to fill.’


8 Boissier, *History of the International Committee*, pp. 141–53. In his work *Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege*, Verlag F. C. W. Vogel, Leipzig, 1873, Dr Gurlt revealed the existence of 291 treaties, cartels and conventions concerning the protection of the wounded and of medical personnel. Apart from a few agreements related to surrender, these accords were all concluded prior to 1800. The research which brought these forgotten precedents to light again was initiated as a result of the interest aroused by the Geneva Conference of October 1863.

9 See the remarks made by Dr Unger at the 1863 Conference, *Compte rendu ... 1863*, pp. 133–4.


11 Boissier notes: ‘... it was better to abandon a small number of wounded with the prospect of looking after much larger numbers than to run the risk of being locked up with all the other prisoners of war’, *ibid.*, p. 100.

12 See Dr Boudier’s remarks at the 1863 Conference, *Compte rendu ... 1863*, pp. 135–6.


14 *Ibid*, p. 64.

15 *Ibid*, p. 65. Later, Moynier was to stress the interdependence between the relief societies and neutral status for the medical services. He wrote of the 1863 Conference: ‘... it saw the abolition of outdated practices and the legal protection of medical services as conditions *sine qua non* for the success of the relief societies. It feared, with reason, that if all the personnel and material provided by private benevolence were incessantly liable to be appropriated by an enemy and diverted from its proper destination, the most enthusiastic philanthropy would become weary of bringing tribute to this bottomless pit’. Moynier, *La Croix-Rouge, Son Passé et son Avenir*, Sandoz & Thuiller, Paris, 1882, p. 31. See also Boissier, *History of the International Committee*, p. 79.

16 Had Dunant obtained the support of his colleagues on this crucial point, it can be assumed that – as he was writing the minutes – he would not have failed to note it. The records would lead us to believe that on this point he stood alone, a view borne out by what came later.

17 Seen against the development of the organization as a whole, whatever disagreements there might have been between Dunant and his colleagues on the Committee over the neutrality of medical personnel and the wounded are immaterial. The main point was that Dunant was able to manoeuvre the Committee, like it or not, into supporting this cause. Historians and others interested in these differing points of view can refer to Boissier, *History of the International Committee*, pp. 61–8 and 78–80.
The ICRC and the Protection of War Victims


19 Particular mention should be made of the Order of St John, whose example inspired the founders of the Red Cross.

20 C. Lueder, La Convention de Genève au point de vue historique, critique et dogmatique, Edouard Besold, Erlangen, 1876, pp. 34–7. However, Lueder adds: ‘But it is … openly acknowledged that Dunant, like his associates in the two successful Geneva meetings, was totally unaware of the works of Arrault and Palasciano’, Lueder, La Convention de Genève, p. 36.

21 Compte rendu … 1863, p. 37.

22 The Instructions were promulgated by President Lincoln as General Orders no. 100 on 24 April 1863 – see The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents, edited by Dietrich Schindler and Jiri Toman, third edition, Henry Dunant Institute, Geneva, and Martinus Nijhoff, Dordrecht, 1988, pp. 3–23.

23 Dunant, A Memory of Solferino, p. 126.

24 At the 1863 Conference, Dr Loeffler sharply focused on the correlation between the international aspect of the projected work and the impartial treatment of the wounded: ‘If these preparations … had an international character, the colour of a man’s trousers, if you will excuse the expression, would no longer influence his entitlement to aid; no one would worry if the trousers were red, grey or blue: simply being a wounded soldier would be an adequate passport to help’. Compte rendu … 1863, p. 102.

25 In his introductory speech on behalf of the Committee to the 1863 Conference, Moynier said it would be wise to avoid the drawing up of too detailed regulations for the proposed institution: ‘To be recognized in all countries without offending susceptibilities, it would be well to leave to each State the business of regulating questions of secondary importance, while at the same time laying a useful, even necessary, foundation for this work’. Compte rendu … 1863, p. 71.

26 Meeting of 25 August 1863, IRRC, no. 23, February 1963, pp. 69–70;


29 The circular of 15 September is contained in Actes du Comité international, 1871, pp. 5–6. See also Boissier, History of the International Committee, pp. 63–4.

30 Compte rendu … 1863, pp. 16–20; Actes du Comité international, 1871, p. 18. Names of the delegates are also given in Boissier, History of the International Committee, p. 70.


32 See Compte rendu … 1863; details are also given by Boissier, History of the International Committee, pp. 70–83.

33 Compte rendu … 1863, p. 10.

34 Ibid, pp. 95–6.


36 A recommendation to this effect had been received in a letter from the Russian Minister of War, General Milyutin: ‘While expressing my personal sympathy for your proposals […], I believe at the same time that it would be wise to avoid absolutely any discussion of matters
touching on international law, and to leave this side of the question to the initiative of the competent government bodies'. Compte rendu ... 1863, p. 30.
37 Boissier, History of the International Committee, p. 80.
38 Compte rendu ... 1863, pp. 147–9; Handbook of the International Red Cross and Red Crescent Movement, pp. 613–15; The Laws of Armed Conflicts, pp. 275–7.
39 This was how the Committee understood it, anyway: ‘The work of the Conference would have been incomplete and sterile if it had restricted itself to passing Resolutions and Recommendations, without concerning itself about what would have to be done after the delegates went home: action was needed to put the votes into effect. This is why the Conference charged the Geneva Committee to see that what had been deemed good and desirable in theory would be put into practice as quickly as possible’, Communication by the International Committee dated 15 June 1864, reproduced in Actes du Comité international, 1871, p. 18. See also Lueder, La Convention de Genève, p. 73.
42 The Circular of 15 November 1863 is reproduced in the Actes du Comité international, 1871, pp. 9–10.
44 Secours aux Blessés: Communication du Comité international faisant suite au compte rendu de la Conférence internationale de Genève, Imprimerie Fick, Geneva, 1864; Actes du Comité international, 1871, p. 36.
47 The latter interpretation seems to be the one upheld by General Dufour in his opening speech to the Diplomatic Conference of August 1864, Compte rendu de la Conférence internationale pour la Neutralisation du Service de Santé militaire en Campagne, réunie à Genève du 8 au 22 août 1864 (hereinafter Compte rendu ... 1864). A manuscript version of the proceedings is held by the ICRC library; it is reproduced in de Martens, Nouveau Recueil général de Traités, vol. XX, pp. 375–99, and in the Revue internationale de la Croix-Rouge, no. 425, May 1954, pp. 416–23; no. 426, June 1954, pp. 483–98; no. 427, July 1954, pp. 573–86. See also Boissier, History of the International Committee, p. 115.
50 Compte rendu ... 1864, pp. 1–10; see also Boissier, History of the International Committee, p. 114–19.
51 Le Congrès de Genève: Rapport adressé au Conseil fédéral par MM. Dufour, Moynier et Lehmann, Pléniopotentiaries de la Suisse, Imprimerie Fick, Geneva, 1864, p. 3 (the report is included in Actes du Comité international, 1871, pp. 44–9).
52 Compte rendu ... 1864, p. 9; Le Congrès de Genève, p. 3.
53 Compte rendu ... 1864, pp. 10–12.
54 At any rate, there is no record of any such discussion to be found in the conference proceedings.


This intention can be seen in a letter from Moynier to Dunant, dated 1 June 1864: ‘Once a neutralization convention is signed and committees are set up everywhere, as they soon will be, there will be nothing much left to do, and we will at least have had the satisfaction of having completed our, or rather your, enterprise all together’, ICRC Archives, file ‘Comité international 1863–1880’, (also quoted by Boissier, *History of the International Committee*, p. 111). It is also expressed in a circular letter from the Committee to the population of Geneva, dated 15 June 1864 and seeking financial support: ‘It is unlikely that the members of the Committee will make further appeals to the generosity of their fellow citizens, as the mandate they received from the Conference is only a temporary one and will soon come to an end’, ICRC Library, collection of Circulars from the International Committee (unclassified).

The importance of the 9 February 1863 meeting of the Geneva Public Welfare Society, which served as little more than the pretext for the creation of the International Committee, should not be overestimated. From the start, the Committee went beyond the mandate it had received, declaring itself a permanent body and acting in its own name rather than that of the Society.

References


The works cited in Chapter I may also be consulted.
CHAPTER III

ON THE BATTLEFIELD 1864–1914

The Minstrel Boy to the war is gone,
In the ranks of death you’ll find him;
His father’s sword he has girded on,
And his wild harp slung behind him.
Thomas Moore, *Irish Melodies*

1. Introduction

By the end of 1864, the International Committee’s objectives were on the point of being achieved. Relief societies had been set up in a number of countries and the Geneva Convention had become part of the law of nations.

Certainly, there was still work to be done in encouraging the creation of societies in countries which did not yet have one, and in urging the remaining governments to accede to the Convention, but this was little more than putting the final touches to a project that was largely accomplished. As architect of the grand design, the Geneva Committee could wait for the moment – which seemed near at hand – when its work was completed, and then quietly withdraw.

However, before reaching that point the Committee found itself thrust into a new and unforeseen course of activity – that of providing assistance to war victims. From simply promoting humanitarian law it was to go further and make a contribution – modest, no doubt, but certainly necessary – to the implementation of that law. This change of direction did not result from any conscious decision on the part of the Committee, but from the pressure of circumstances and the needs of wounded soldiers. A vital cog was missing from the machinery created at the Conferences of 1863 and 1864, which was consequently on the verge of breaking down altogether. It is easy to see why the Committee sought to fill the gap, while never admitting that in doing so it was going beyond the self-imposed confines of its original role.

In this way the Committee came to be transformed – sometimes against its will – from being the initiator of an idea into an active neutral intermediary between the belligerent parties. That transformation should be examined a little more closely.

It was not, however, a continuous, smooth progression but, on the contrary, a hesitant process in which bold initiatives alternated with backtracking which is hard to explain today.

This process can be retraced through the Committee’s responses to the various conflicts which broke out between its foundation and the First World
War. For the sake of brevity, this examination will be limited to seven wars which gave rise to particularly significant initiatives:

- the Schleswig-Holstein conflict (1864);
- the Austro-Prussian War (1866);
- the Franco-Prussian War (1870–1);
- the war in the Balkans and the Caucasus (1875–8);
- the Serbo-Bulgarian War (1885);
- the Boer War (1899–1902);
- the Balkan Wars (1912–13).

2. **The Schleswig-Holstein conflict (1864)**

For many years, Danish and German nationalism had coexisted uneasily in the duchies of Schleswig and Holstein. These were attached to the Danish crown, although most of the inhabitants regarded themselves as German, through language and culture. In November 1863 the death of King Frederick VII of Denmark opened a dispute over the succession and swiftly led to the intervention of Prussia and Austria.

On 1 February 1864 Prussia and Austria invaded Denmark. On 13 March the International Committee decided to send two delegates to the area: Dr Appia set off to the Austro-Prussian side, whereas Captain Van de Velde, Netherlands delegate to the 1863 Conference, was dispatched to Denmark. Their instructions were as follows:

1. to give whatever help they could to the wounded …
2. to examine, on the spot, how the decisions of the Geneva Conference were being, or might be, implemented.

The two delegates’ reports were subsequently published. It would be fascinating to recount all that happened during that first ICRC mission. But we must press on, so the results will be summarized as follows:

a) The delegates were sent to both sides of the front in order to maintain the Committee’s ‘reputation of impartiality’.

b) They carried letters of introduction from the Committee – but it was also felt necessary to request letters of recommendation from the Swiss government.

c) The two men wore a white armband with a red cross, which itself proved to be a useful laissez-passer.

d) The delegates took every opportunity of making known the Resolutions and Recommendations of the 1863 Conference.

e) After the storming of the **Dupepler Schanzen** (the Danish fortified defence line), Dr Appia carried out a cross-line mission to hand over a Danish officer’s mortal remains. Captain Van de Velde also wanted to cross the lines to find out the names and state of health of Danish troops.
captured by the Prussians. For security reasons his request was turned down; he was, however, able to visit German and Austrian troops held by the Danish forces.10 Was it simply a coincidence? This first mission already gives a clear indication of the role in which the Committee was to assert its true calling: that of a neutral intermediary between the belligerents.

Needless to say, there was no question of any supervisory activity during these missions, as the Committee had no such authority. In any case, the Geneva Convention was still only a draft and there was as yet nothing to supervise.

3. The Austro-Prussian War (1866)11

Far from resolving their underlying antagonism, the combined victory of Austria and Prussia over Denmark only served to exacerbate the rivalry between them over domination of the German Confederation. Italy concluded an alliance with Prussia with the aim of snatching Venetia (which had been sacrificed at the 1859 armistice of Villafranca) from Austria; meanwhile Austria entered into alliances with the states of southern Germany, which feared Prussian expansionism. War became inevitable and on 14 June 1866 the Diet voted in favour of mobilization.

This was the first conflict in which the applicability of the Geneva Convention had to be taken into account. However, from a legal point of view, things were not straightforward.

While Prussia and Italy had ratified the Convention, Austria and several of its allies had not. As a treaty is binding only between contracting parties, Prussia and Italy would have been justified in considering themselves free of any legal obligation.

The International Committee concentrated on remedying this situation. Even before hostilities began it asked the Vienna Central Committee to seek Austria’s accession to the Convention; it also approached the French and Swiss governments, asking for their diplomatic support. Similar representations were made to the rulers of the southern German states, with some success: Württemberg ratified it on 2 June, Hessen on 22 June and Bavaria acceded to it on 30 June. As things turned out, Prussia decided to apply the Convention unilaterally from the start of the hostilities (15 June). Austria refused to accede to it, but events were to prove more persuasive than words: Vienna put its signature to the Convention on 21 July, barely three weeks after its defeat at Sadowa.

The conflict also saw the beginnings of active solidarity between Central Committees, in line with Article 5 of the October 1863 Resolutions which stated that in time of war, committees of belligerent nations ‘may call for assistance upon the committees of neutral countries’.
To this end, the Milan committee submitted a request for help to the International Committee which, on 12 July, sent an appeal to the Societies of neutral countries. The appeal seems to have been passed on too late, just as the hostilities were coming to an end: only the French and Swiss Societies responded by sending emergency supplies to Italy.

Geneva appears to have stayed in contact with the Central Committees of the belligerent states, thus maintaining at least a minimum of communication between the Societies of the opposing countries.

Two points stand out from this conflict:

a) Measures taken by the International Committee were essentially aimed at having the Geneva Convention applied; the Committee approached Austria and its German allies several times, requesting them to become party to the Convention, and it urged Italy to apply the Convention unilaterally, following the Prussian example. The Committee’s attention was therefore centred on the legal situation.

b) The International Committee also enabled communication to be maintained between the relief societies of the belligerent states, and between them and those of neutral countries; this was a first extension of the role conferred on the Committee by Article 10 of the 1863 Resolutions. The article was basically concerned with the Committee’s role in promoting the movement; the war of 1866 showed the usefulness of the Committee’s special position to contribute to the movement’s practical work.

On the other hand, the Committee does not appear to have considered becoming directly involved in helping the victims of the conflict.

4. The Franco-Prussian War (1870–1)

Bismarck believed that to complete the unification of Germany, France had to be crushed: in July 1870, war broke out between France and Prussia on the pretext of yet another succession dispute – this time over the Spanish crown.

The duration and scale of this conflict allowed the infant Red Cross movement to show the full measure of its potential; at the same time it induced the International Committee to make some important innovations.

The legal framework

At the opening of hostilities the legal framework was radically different from that prevailing in 1866 in the war between Prussia and Austria: this time all the belligerents were party to the 1864 Geneva Convention.

However, after the war of 1866 it had been felt necessary to clarify and extend the provisions of the Convention. A new Diplomatic Conference met in 1868 and adopted fifteen additional articles, nine of which concerned war at sea. But they were never ratified, and so never entered into force.
The International Committee’s first concern was therefore to persuade the belligerents to pledge that they would respect the 1868 Additional Articles on a bilateral basis. The Swiss government made a similar request and this two-pronged approach achieved the required result, namely that the principles of the Geneva Convention were applied to naval warfare.

The International Agency for Aid to Wounded Military Personnel (‘Basel Agency’)

The International Conferences of Relief Societies held in Paris (1867) and Berlin (1869) had discussed the composition and duties of the International Committee. The Berlin Conference adopted the following resolution:

In time of war, the International Committee shall ensure that a liaison and information office is set up in a suitably chosen location, which shall facilitate, in every possible way, the exchange of communications between committees and the sending of relief supplies.

The International Committee accordingly established an international agency in Basel for aid to wounded soldiers, and announced its opening when hostilities began.

In the Committee’s view, the Basel Agency had three tasks to fulfil:

- to serve as the unofficial intermediary between the relief societies of the warring nations which, it was felt, would wish to co-operate in the interest of the victims;
- to help in the exchange of information between the societies of the countries at war and those of neutral states;
- to facilitate the forwarding of relief supplies.

Of these three areas of activity, it was the third which was to become by far the most important. Assistance in the form of supplies and money was soon pouring into Basel, giving rise to two distinct problems concerning its distribution.

The first was its allocation. As most of the wounded would soon be under the control of the advancing German army, to be impartial, ought the relief to be divided equally between the two sides? The International Committee thought not and instead felt it fairer to apportion the supplies according to need. This principle was applied by the Basel Agency and strictly adhered to thereafter by the Committee.

The second was its forwarding. In order to reduce costs, the Basel Agency was quickly able to secure an exemption from postal and customs duties for its consignments. This deserves mention because it was the first practical sign of recognition and support by governments of the work of the International Committee and the Agency.

However, the forwarding of supplies became more and more difficult as lines of communication were stretched to their limits and bottlenecks developed on the railways. To overcome the problem the Agency appointed...
delegates to escort and deliver the supplies; around fifty people were delegated for this task, some of them carrying out several missions.25

Their job was first of all to accompany the relief supplies, either to the warehouses of the respective Central Committees or to the mobile hospitals established by the medical services or relief societies near the front.26 Generally speaking, the Agency’s delegates were not asked to distribute the supplies to the victims, as under the terms of the 1863 Resolutions, this was the task of the National Societies and not of the International Committee.27

Apart from this, the Agency delegates took it upon themselves to gather as much detailed information as possible about the number of wounded, the state of mobile hospitals and the most urgent needs. Rather than simply recording the data sent by the national committees of the countries at war, the Agency tried to obtain its own firsthand information.28

The relief consisted mainly of dressings, medicines, surgical instruments, clothes and food; small amounts of other items were also sent, such as tobacco, soap and wine.

The disruption of postal services between France and Germany soon opened up yet another area of activity: on 31 July, the International Committee announced that the Basel Agency was setting up a correspondence service between prisoners – whether wounded or not – and their families.29 As the number of prisoners rose, so too did the number of mailbags – eventually about a thousand letters a day were arriving at the Agency.30

To facilitate its work, postal charges for this mail were waived by the belligerent states and by Switzerland, the country of transit.31

The Basel Agency also set up an information bureau in respect of wounded and sick prisoners. Lists of names were obtained and published and enquiries were sent to Central Committees and governments in an effort to answer the numerous requests it received for information about missing soldiers.32

* 

Article 6 of the Geneva Convention stipulated that wounded prisoners ‘who, after their recovery, are recognized as being unfit for further service, shall be repatriated’.

The International Committee and the Basel Agency set about putting this rule into practice. Thanks to their efforts, some 2600 wounded and disabled prisoners were repatriated through Switzerland. The Agency covered the cost of transport within Switzerland as well as accommodation and hospital expenses, mainly in Basel and Geneva.33

On the other hand, despite many offers of help the Agency refused to set up its own mobile hospital units, for two reasons:

- Under the terms of the October 1863 Resolutions, the organization and supervision of voluntary relief personnel in the field was the sole responsibility of the Central Committees of the belligerent nations.
The Geneva Convention ruled that only the military authorities were empowered to issue the red cross armband to personnel with neutral status.\(^{34}\)

The Basel Agency found itself besieged with requests from doctors, nurses and others who wanted to sign up under the new flag of international charity. Its response was to recommend that they offer their services to the relief societies concerned.\(^{35}\)

This example shows clearly the limits which the International Committee set on its activities. Even though, in an operational sense, it had largely overstepped its mandate from the Berlin Conference,\(^{36}\) it refused to undertake any activity which went beyond its specific role as a neutral intermediary and which infringed on the responsibilities of the national committees.

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**Prisoners of war**

The successive defeats inflicted on the French armies and the duration of the conflict brought about a new problem: the prolonged detention of hundreds of thousands of prisoners.

Should the Committee expand its activities and do something for these prisoners? It received numerous appeals to do so; however, it felt that it would be inappropriate for an organization created to help wounded and sick soldiers to start assisting other victims. In particular, the Committee considered that the red cross emblem, which had been granted legal authority by the Geneva Convention, should not be used to provide assistance to able-bodied prisoners.\(^ {37}\)

Ever inventive, the Committee got round the problem by creating a new body in Basel, separate from the Agency, and with its own distinct emblem: the *green* cross.\(^ {38}\)

The International Relief Committee for Prisoners of War carried out the same sort of work as its sister body, the Agency – with which it shared offices. It collected and dispatched relief (mainly blankets and clothes), forwarded mail, published lists of prisoners, and tried to trace missing soldiers. It corresponded with about a hundred commanders of camps and fortresses, and likewise used delegates for its work; it is interesting to note that the International Relief Committee for Prisoners of War also established relations with a number of prisoners’ committees.\(^ {39}\)

\smallskip

**Military personnel interned on neutral territory**

The internment in Switzerland of General Bourbaki’s French army, in the depths of winter and under appalling conditions, prompted the creation of a third body: the Central Relief Agency for Members of the Armed Forces interned in Switzerland.\(^ {40}\)

Again, this Agency carried out activities similar to those of its sister agency for prisoners of war, but solely for soldiers interned on Swiss territory.\(^ {41}\)
**Application of the Geneva Convention**

Despite these various operational activities, the Committee did not lose interest in how the Geneva Convention was being applied. While it had no formal authority to intervene with the belligerents, it decided to do so in cases which ‘related to general facts known to everyone’.\(^{42}\) Two such cases were made public after the war:

- In August 1870 the Committee drew the French government’s attention to the fact that French soldiers had no knowledge of the Convention, and that military doctors and nurses had not been issued with the red cross armband.\(^{43}\)
- In September and October 1870 it asked the Prussian government and the German Central Committee to apply 1868 Additional Article 5, concerning the repatriation of the wounded after they are cured.\(^{44}\) The Prussian government turned down the request, claiming that France was unable to guarantee that the repatriated soldiers would not take up arms again.\(^{45}\)

**Conclusion**

During the Franco-Prussian War, the International Committee took new initiatives, going well beyond the duties assigned to the mere information bureau envisaged by the Berlin Conference. Even though it is difficult to take full stock of its activities,\(^{46}\) and although the Agency handled only part of the assistance supplied by the relief societies,\(^{47}\) it remains clear that the International Committee confirmed, in practice, its position as a neutral intermediary and that it established basic operational procedures in the following fields:

- delivery of relief supplies;
- sending of delegates into the field;
- transmission of mail;
- opening of an information bureau and publication of lists of wounded soldiers and prisoners of war;
- repatriation of the wounded;
- representations to ensure the application of the Geneva Convention.

In view of these achievements, it is surprising to note how far the Committee’s acknowledged policy lagged behind its practical work.

The most striking example is the protection of prisoners of war: the Basel Agency addressed their needs from the start, at least in terms of correspondence and the supply of medical equipment to infirmaries in the camps. Nonetheless, the Committee felt it necessary to create a separate bureau to assist able-bodied prisoners – and it took pains to point out that this new body operated completely independently.\(^{48}\)

In fact, this was not true: the bureau was directed by a member of the Basel Agency, it used the same offices and staff, applied the same principles to its
work and provided the same services; like the Agency itself, it was answerable to the International Committee for administrative and management questions.49

But some forty years were to pass before the Red Cross gave formal consideration to a matter which had been of concern to it since the beginning, and which constituted a natural progression from helping the wounded, namely assistance for able-bodied prisoners of war.

5. The war in the Balkans and the Caucasus (1875–8)50

The declining power of the Ottoman Empire and the national aspirations of its Christian provinces coincided to rekindle the smouldering conflict known as the ‘Eastern Question’.

In August 1875 rebellion flared in Herzegovina, spreading to Bosnia and Bulgaria. Brutal repressive measures sent Christian refugees pouring into Montenegro and Serbia; in June 1876 the two principalities declared war on the Sublime Porte, but within a few months their armies succumbed to its superior forces.

Russia, however, was not willing to tolerate the subjugation of its protégés and its resulting loss of influence. Having secured Austria-Hungary’s neutrality, it intervened on 13 April 1877. The war was fought in the Balkans and the Caucasus, culminating in defeat for the Turks who requested an armistice on 31 January 1878.

The Congress of Berlin, from 13 June to 13 July that year, thereupon imposed a territorial settlement which sought to reconcile the rival Balkan ambitions of the Russian and Austro-Hungarian empires.

The legal framework

The Geneva Convention had been ratified by Russia, Romania, Greece and the Ottoman Empire. But the principalities of Montenegro and Serbia, considered as the Ottoman Empire’s vassal states, had not been invited to do so.

As soon as the uprising began in Herzegovina the International Committee made discreet attempts to get the two principalities to accede to the Convention; Montenegro did so on 29 November 187551 and Serbia on 24 March 1876.52 The Sublime Porte protested against the accessions, deeming them null and void because of the vassal status of the two territories.53

It might have been hoped that the Convention would be fully applied in the conflict between Russia and the Ottoman Empire – but any such hope was in vain. On 16 November 1876 the Sublime Porte informed the Swiss government, as depository of the Convention, that while it would respect the red cross as the emblem of neutrality on enemy ambulances, it would henceforth use the sign of the red crescent on a white ground to protect its own.54
This unilateral decision meant, in fact if not in strict legal terms, that the Convention was suspended between the Ottoman Empire and the other contracting parties until a legal agreement over the change of emblem had been reached. The Ottoman demand gave rise to a lengthy exchange of correspondence between Berne and the other parties to the Convention. For its part, the International Committee set about trying to negotiate an unofficial, provisional arrangement to resolve the problem for the duration of the war. An agreement was reached between Russia and the Ottoman Empire in June 1877, more than two months after the start of hostilities.

Medical services and relief societies

Of the countries involved in the conflict, Russia alone had both a military medical service and a Red Cross Society; Montenegro, Serbia, Romania, Greece and the Ottoman Empire had neither. It was therefore essential to create National Societies which, with the help of those of neutral countries, could provide basic medical services.

The International Committee did all it could to promote the founding of the new Societies: it sent a delegation to Montenegro, and initiated contacts in Belgrade, Bucharest, Athens and Constantinople with people likely to support the work of the Red Cross. It then put the fledgling committees into contact with their longer-established counterparts, and before long was able to announce the creation of Red Cross Societies in Montenegro, Serbia, Romania, and Greece, as well as the reconstitution of the Ottoman Society.

According to reports at the time, it appears that most of the assistance to the wounded in Montenegro, Serbia, Romania and within the Ottoman Empire was provided by the Red Cross. The Russian Society played a major role in evacuating wounded and sick soldiers back to home territory.

The mission to Montenegro

The ruthless suppression of the uprising in Herzegovina sent nearly 40,000 people fleeing into Montenegro to seek refuge. The numbers were far too great for the principality to cope with, and its government asked the International Committee for Red Cross assistance.

The Committee itself could provide no help; all it could do was ask relief societies to come to the aid of a sister society in need. But there was no such body in Montenegro, so to help create one the International Committee decided to send a delegation to the capital, Cetinje.

The Committee set a condition for this mission: Montenegro’s accession to the Geneva Convention. As the Red Cross Societies acted as auxiliaries to the official medical services, it would have been illogical to create one in a country whose government had not subscribed to the same principles as the Red Cross concerning assistance to the wounded, in particular to that of helping all wounded, to whatever nation they may belong.
Montenegro acceded to the Convention on 29 November 1875, and on the same day its government formally requested the International Committee to send a delegation.65

The Committee gave its delegates detailed instructions for their mission, specifying the following activities:

a) to organize assistance for the wounded in a regular and permanent manner, and in particular to bring about the formation of a Red Cross Society; to make known the Geneva Convention and the work of the Red Cross;

b) to assist wounded and sick combatants and, secondly, wounded and sick refugees;

c) to try, as far as possible, to bring the humanitarian principles of the Convention to bear on the fighting in Herzegovina (this point, however, ran counter to another provision which restricted the delegates to Montenegrin territory).66

The Committee’s three delegates – Aloïs Humbert, Charles Goetz and Dr Ferrière – left Geneva on 28 December 1875 and arrived in Cetinje on 9 January; the following day they were received by Prince Nicholas I.

The Montenegro Red Cross Society was soon established, and the delegates turned their attention to running a makeshift field hospital near the border. They do not seem to have been in a position to influence the conduct of hostilities in Herzegovina; the meetings planned with the Turkish military authorities in the province failed to take place. The delegates returned to Geneva the following March.67

The mission to Montenegro seems to have been more official than the one to Schleswig in 1864; three things point to this:

a) The International Committee sent its delegation at the request of the principality’s government.

b) The delegates were instructed to ‘go directly to Cetinje to present their letters of credence to H.S.H. Prince Nicholas’;68 while it is not certain that the term ‘letters of credence’ implied a diplomatic mission and status,69 it certainly indicates that the mission was official;

c) during their stay in Montenegro the delegates were under the protection of the prince, who provided them with a bodyguard and an interpreter.70

The Trieste Agency

The International Committee awaited the outcome of the negotiations over the Ottoman Empire’s decision to replace the red cross by a red crescent as the protective emblem for its military medical services before establishing an agency similar to the one set up in Basel during the Franco-Prussian War.71

It chose Trieste as the location and announced its opening on 14 July 1877.72 The new agency was intended to perform the same duties as its predecessor.73
But in actual fact, the Trieste Agency was not very active. There appear to be three reasons for this:

a) It was opened well after hostilities began, and by then the Red Cross Societies of neutral countries had found other ways of sending relief supplies.74

b) Trieste was too far away from the main conflict areas; the Agency established good sea links with Constantinople, but the bottlenecks on the railway system made the dispatch of goods to Serbia, Romania and Russia very unreliable.75

c) The Agency received little information from the belligerents; it was not informed which relief supplies were most urgently needed and, despite the efforts of the International Committee, it received no lists, either of wounded or of prisoners; clearly, under these conditions it was impossible for an information bureau to operate.76

Application of the Geneva Convention

The conflict was marked by a succession of massacres and other atrocities. The constraints which the law of war tried to impose on the combatants’ savagery were swept away by racial and religious fanaticism.

Across Europe there was an outcry against the Ottoman Empire – even Britain, traditionally well-disposed towards Turkey, was appalled at the news of the slaughter in Bosnia and Bulgaria. Without passing judgement, it must be admitted that the evidence weighed heavily against Constantinople: although party to the Convention since 1865, the empire had no military medical service worthy of the name; neither officers nor men had been informed of their obligations under the Convention; the number of prisoners taken by the Turkish army was alarmingly small; and the use of irregular troops, uncontrollable and impervious to discipline, was a damning indictment.

In the face of this, what was the International Committee to do?

First, it made unofficial representations to the Sublime Porte, passing on complaints it had received and reminding the Turkish authorities of their obligations. These approaches had no effect.77

The Committee thereupon appealed to public opinion: on 21 September 1876 it published a document which, under the guise of examining the application of the Geneva Convention during the Balkan war, amounted to a summary of the charges against the Turkish army.78 The Committee then went on to publish the belligerents’ reciprocal complaints of violations of the Convention and alleged eyewitness reports testifying to them.79

With hindsight, the wisdom of the Committee’s decision to go public might seem questionable:

a) The one-sided condemnation of the Ottoman Empire would certainly not have helped those in Constantinople who were trying to establish the
Ottoman Red Crescent Society and to encourage respect for the principles of the Geneva Convention.

b) The publication of a host of complaints and counter-accusations resulted only in a macabre and sterile controversy; it does not seem as though anything was done to establish the facts, nor to punish those guilty of violating the Convention.

It may well be asked whether, in acting as it did, the International Committee compromised its position of neutrality – at least as far as one side was concerned – without achieving any tangible results.

6. The Serbo-Bulgarian War (1885)

After the Congress of Berlin, Serbia and Bulgaria remained locked in a border dispute, and on 14 November 1885 war broke out. Murderous but brief, the conflict gave rise to an impressive show of solidarity by neutral relief societies.

What part did the International Committee play?

Appeals to the National Societies

Both Serbia and Bulgaria had operational Red Cross Societies. On 20 and 24 November 1885 the International Committee asked for support, on their behalf, from the Societies of neutral countries, and once again the Red Cross provided most of the care for the wounded. New procedures based on scrupulous cleanliness, sterilization of instruments and antiseptic precautions were introduced for war surgery; these practices were unknown to the official medical services of the time.

The Vienna Agency

The 1869 Berlin Conference resolution calling for the establishment of an international relief agency in time of war did not say that the International Committee necessarily had to run it; a National Society could be requested to do so. In the Serbo-Bulgarian War the Committee asked the Vienna Central Committee to assume this responsibility on behalf of the entire movement. The opening of an international relief agency under the auspices of the Austrian Red Cross was announced by the Committee on 4 December 1885.

The Vienna Agency dealt mainly with the forwarding of relief supplies; it sent a delegate to Serbia and Bulgaria to visit hospitals, assess needs and organize the transport and delivery of consignments. He was able to travel from Serbia to Bulgaria across the front line. Because of transport difficulties via the Balkans in winter, subsequent relief bound for Bulgaria was allowed to pass through Serbia and across the lines.
Lists of wounded soldiers and prisoners of war were exchanged, either through the Agency’s delegates or directly between the Serbian and Bulgarian Societies.\textsuperscript{87} As the war lasted only two weeks and the prisoners and movable wounded were repatriated immediately after the cease-fire, it did not become necessary to set up a mailing service or information bureau.

\textbf{Application of the Geneva Convention}

The Convention appears to have been scrupulously respected by both sides.

One point deserves mention: the Bulgarian Foreign Minister sent the International Committee a complaint concerning an alleged attack on a Bulgarian ambulance by Serbian troops. The Committee transmitted the complaint to Belgrade which set up a commission of enquiry. Its report – later confirmed by witnesses – was sent to the Committee, which in turn passed it on to the government in Sofia.\textsuperscript{88}

This was the first example of a new procedure adopted by the International Committee, which was far more likely to help ensure the faithful application of the Convention than the acrimonious exchange of public allegations which had marked the Balkan crisis.

7. The Boer War (1899–1902)\textsuperscript{89}

The Boer settlers of the Transvaal Republic and the Orange Free State put up unrelenting resistance to the spread of British rule in southern Africa. Fighting had flared up several times between 1877 and 1881; in 1895, a British expedition into the Transvaal – the Jameson Raid – ended in humiliation. In October 1899, the British authorities decided to settle the matter once and for all; London had foreseen an easy victory, but the war was to last more than two years.

\textbf{The legal framework}

Soon after the Jameson Raid, the International Committee invited both Boer republics to accede to the Geneva Convention. The approach was well received: Transvaal did so on 30 September 1896 and the Orange Free State followed suit on 28 September 1897.\textsuperscript{90} Britain protested against these acces-sions, but when war broke out in October 1899 it did not dispute the Convention’s applicability.

\textbf{The Lourenço Marques Agency}

At the International Committee’s request, the Portuguese Red Cross agreed to set up a relief agency in Lourenço Marques,\textsuperscript{91} but wanted to make an innovation: whereas those in Basel, Trieste and Vienna had been run by nationals of neutral countries, the Portuguese Red Cross proposed that the Lourenço
Marques Agency be placed under the responsibility of a three-member board: one delegate representing the British Red Cross, another the Societies of Transvaal and the Orange Free State, and the third the Lisbon Central Committee. That was enough to undermine the project, as the British Red Cross refused to appoint a representative. Clearly, London was not prepared to sit down at the same table as a representative of the Boer republics.

8. The Balkan Wars (1912–13)

By rejecting the proposed ‘Greater Bulgaria’ the Congress of Berlin re-established Turkish rule in Macedonia. But unrest continued in the province, fanned by the proximity of its independent, and mainly Christian, neighbours; in 1911, these States formed alliances against the Ottoman Empire.

The war between Italy and Turkey allowed the Balkan League members to realize their ambitions, and in October 1912 Bulgaria, Serbia, Greece and Montenegro themselves declared war on the Ottoman Empire. The Turks, weakened by their defeats in Tripolitania and the Dodecanese, were quickly overwhelmed, and on 3 December requested a cease-fire. Hostilities resumed briefly the following year, ceasing on 16 April. The first Balkan War was ended by the Peace of London (30 May 1913), which also terminated Ottoman domination of Macedonia.

However, the sharing of the spoils soon sowed new discord among the victors. The second Balkan War ensued, in which Bulgaria was pitted against a coalition formed by Serbia, Greece, Romania and Turkey. Bulgaria capitulated on 30 July, and the Peace of Bucharest (10 August 1913) brought a fragile settlement to the Balkans.

What was the ICRC’s role during these two wars?

The Belgrade Agency

On 16 November 1912 the International Committee announced the opening of the International Belgrade Agency for relief to the wounded and prisoners of war; it was headed by the Swiss Consul-General, M. Christian Vögeli. Voegeli’s instructions showed that the Belgrade Agency was to differ substantially from its predecessors, its main duty no longer being to forward relief, but to centralize information about the wounded and prisoners of war. This followed Resolution VI of the Ninth International Conference of the Red Cross, held in Washington, 1912, in which the Red Cross decided to extend its activities to include assistance to prisoners of war.

The results were mixed. In Serbia, the Agency was able to establish and maintain up-to-date lists of all captured Turkish military personnel. It sent representatives to the various camps and other places of detention to make lists and to try to trace missing Turkish soldiers.
The Greek and Montenegro Red Cross Societies provided lists of captured Turkish officers, and enquired about wounded or missing soldiers.

In Bulgaria, the Red Cross failed to obtain any information about captured enemy soldiers during the war, and was able to provide a complete list of prisoners only once the hostilities had ended.

No information whatever was forthcoming from the Ottoman authorities concerning the prisoners in their hands. The Red Crescent Society, however, sent the Agency numerous requests for information about captured or missing Turkish soldiers. The Agency replied to these in so far as it was able to obtain the relevant information from the Balkan States.98

So the Agency’s work was of varying success. This was due above all to the inadequacies of the conventions then in force: the 1907 Hague Regulations did provide for the exchange of information about prisoners of war, but only after the conclusion of peace.99 The Bulgarian authorities were therefore not in breach of their international obligations in waiting until the end of hostilities before transmitting lists of Turkish prisoners, even though the lists had then lost much of their humanitarian value because the prisoners had meanwhile been repatriated.

The Red Cross had nonetheless set two important precedents: it had confirmed its authority in terms of protecting prisoners of war, and it had shown itself capable of overcoming legal shortcomings by managing to exchange information – if only partially – about prisoners while hostilities were still taking place.

**Missions by the ICRC**

The Committee sent two missions to the Balkans.

The first, by Dr de Marval – a member of the Swiss Red Cross – was to see how the assistance provided by the Societies of both neutral and belligerent states was being organized.

In November and December 1912, Dr de Marval went to Serbia, Bulgaria, Montenegro and Greece, visiting Red Cross field hospitals and medical installations, both at the front and away from the fighting. His report focused primarily on practical concerns: locating the wounded on the battlefield, identifying them, organizing care behind the front, logistical considerations, and so on.100

The other mission was carried out by Dr Ferrière, a member of the International Committee, who went to Serbia, Turkey and Greece in the spring of 1913. His main concern was to study the organization of the Belgrade Agency and the national bureaux for information about prisoners of war.101

The purpose of these two missions was essentially to evaluate the voluntary relief effort for the wounded and prisoners of war and thus to draw conclusions from the Balkan Wars which would help to improve Red Cross work in a future conflict.
Tragically, there was not long to wait. Barely one year later, the outbreak of the Great War was to show how vital these assessments had been.

9. Analytical review

The foregoing pages have served to retrace the main initiatives which were taken by the International Committee in the period from its foundation to the assassination in Sarajevo and which helped either to promote application of the Geneva Convention or to provide some form of assistance to the victims of armed conflicts.

This reconstruction was inevitably no more than an overview, with all the risks entailed in trying to condense half a century of history into a few pages. It shows that there was a great deal of trial and error; numerous initiatives were taken – some were repeated and can be seen as the start of a regular activity, while others remain isolated cases.

At this point the main events must be systematically reviewed so as to see where consistent responses to them formed a pattern, and to single out those initiatives which can be considered as important precedents paving the way for the Committee’s subsequent activity.

This examination will be limited to the initiatives taken during armed conflicts.102

The legal framework

The acceptance of neutral status for medical personnel was the cornerstone of all assistance to the wounded. The work of the Red Cross would have remained insignificant and haphazard without the Geneva Convention being applicable to war on land, and the Additional Articles of 1868 being applicable to war at sea.

The ICRC’s good offices thus proved necessary in a domain which went beyond its own mandate, that is, the legal relationship between parties to a conflict. It intervened on that account in the Austro-Prussian War of 1866, the Franco-Prussian War of 1870, the Russo-Turkish War of 1877–8, the Hispano-American War of 1898103 and the Boer War of 1899–1902.

Even so, the Committee had no authority to act in this essentially diplomatic domain, and had to call on intermediaries itself: in some cases it asked the Swiss government to approach parties to a conflict, while in others it turned to the Central Committees of the warring nations.

Red Cross solidarity

Article 5 of the 1863 Resolutions stipulated that, in time of war, the Central Committees of belligerent nations could request the help of their counterparts in neutral countries.
This provision recognized the existence of a bond of solidarity between the relief societies. But how could this solidarity be put into practical effect?

There were two possibilities: either the committees needing help contacted the others directly, or else they channelled their appeals through a central body. The second solution was seen as preferable as it presented an opportunity to appeal to the movement as a whole.

The International Committee was ideally placed to request help from all National Societies, and it did so on several occasions: the Austro-Prussian War of 1866, the Franco-Prussian War of 1870, the war in the Balkans and the Caucasus of 1876–8, the war in which Peru and Bolivia fought Chile in 1879–83,104 the Serbo-Bulgarian War of 1885, the Sino-Japanese War of 1894–5,105 the Greco-Turkish War of 1897,106 the Hispano-American War of 1898,107 the Boer War of 1899–1902108 and the Balkan Wars of 1912–13.109

On the other hand, no appeals to Red Cross solidarity were made during the Russo-Japanese War of 1904–5 or in the many colonial expeditions which marked European imperialism in the second half of the nineteenth century.

How can this be explained? There are two conceivable reasons. The first has to do with the very nature of Red Cross solidarity. The principle was binding on and observed among the National Societies: the Societies in neutral countries offered their help not to the armed forces’ medical services, nor to the victims of the conflicts, but to their sister Societies in the warring countries. ‘Mutuality’, a commonly used term of the time, aptly captures the nature and the limits of that solidarity.110

Does this mean that the Red Cross was indifferent to the suffering of victims in conflicts where there was no National Society on the spot, able to receive and distribute relief? Certainly not. There was always the possibility of encouraging the creation of new Red Cross Societies in countries affected by war, as was the purpose of the ICRC mission to Montenegro.

The second reason stems from the attitude of some National Societies; it was not unknown for a Central Committee to decline help from the movement, claiming to be able to cope using its own resources. This was notably the case during the Russo-Japanese War.111

It is therefore possible here to define the ICRC’s policy: the Committee appealed to the solidarity of the Central Committees whenever a National Society was faced with a situation of war, provided that the Society in question was ready to accept assistance from the movement.

As a general rule, ICRC appeals were for assistance to wounded and sick military personnel. But there were some exceptions:

- After the rout of the Ottoman armies in 1878, civilian refugees flooded into Constantinople and the Red Crescent, totally overwhelmed, appealed to sister Societies for aid. The International Committee publicized the appeal, but neither endorsed it nor made it the subject of a circular to Central Committees.112
During the Greco-Turkish war of 1897, the Greek Red Cross was likewise faced with a huge influx of refugees; this time the ICRC appealed to other National Societies to support the Greek Committee in looking after them.\textsuperscript{113}

During the first Balkan War, the ICRC appealed for Red Cross solidarity without specifying the categories of victims needing help.\textsuperscript{114}

This was an evolutionary process: for more than thirty years the ICRC abstained from launching appeals for relief activities which went beyond the specific Red Cross mandate – that of helping wounded and sick soldiers. Later the Committee was to acknowledge the need to extend Red Cross assistance to other groups of victims, namely prisoners of war and civilian victims of conflict.

But how effective were these appeals?

It is very clear that the more active National Societies did not always wait for the ICRC to launch an appeal before doing something themselves, which is perfectly understandable. However, it is equally certain that the ICRC’s approach encouraged the mobilization and the involvement of the movement as a whole.

The resources deployed by the Red Cross were moreover highly impressive. In many wars during the second half of the nineteenth century, the official medical services looked like poor relations compared to the hospitals and dispensaries set up by the Red Cross Societies, in particular those of neutral countries.

\textit{The international relief agencies}

The need for efficiency demanded that information and relief be centralized, but the means for doing so first had to be created. The Berlin Conference of 1869 provided for this by making the International Committee responsible, in time of war, for ensuring that an international relief agency was established.

The Committee took this step on only five occasions: the Franco-Prussian War (1870–1), the war in the Balkans and the Caucasus (1875–8), the Serbo-Bulgarian War (1885), the Boer War (1899–1902) and the Balkan Wars (1912–13). Why did it not act similarly during the other conflicts? There appear to be two reasons:

- In some conflicts, the National Societies of the belligerent States said that they could manage without help from the movement; no purpose would have been served in opening an agency to channel supplies which were not required. This was the situation in the Russo-Japanese War.
- In other cases, only one party to the conflict had a National Society. One of the agency’s basic tasks was to share out the relief according to need – but as there would have been only one recipient, there was no sharing to be done and, once again, the agency would have served no useful purpose.
This situation arose in Chile’s war against Peru and Bolivia and in the Sino-Japanese War.

So the ICRC set up agencies only when assistance was requested – or would be accepted – by the National Societies of the belligerent countries, and where relief had to be shared between two or more recipients. The agency therefore had more than a technical role: by making a fair division of relief goods, it gave a practical demonstration of Red Cross impartiality.

What was the relationship between the agency and the International Committee?

The Berlin Resolution requested the Committee to ‘... see to it that a liaison and information office is set up in a suitably chosen location ...’. The Committee was not responsible for running it, but could entrust the task to another body.

From this, two distinct situations arose:

a) The Basel (1870–1), Trieste (1877–8) and Belgrade (1912–13) Agencies were established under the ICRC's own auspices.

b) The Vienna (1885) and Lourenço Marques (1899) Agencies were set up at the ICRC’s request by the Austrian and Portuguese National Societies respectively; they were therefore answerable to the Central Committees of those Societies.

Taking the first case, of relief agencies set up under the auspices of the ICRC, the question to be considered is whether the agency should be seen as an independent body, or as an integral part of the ICRC?

In the absence of written regulations, the answer must be sought in the actual facts: each agency was set up after an on-the-spot mission by a representative of the International Committee; a local committee was then formed, to be responsible for managing the agency according to instructions from Geneva; the International Committee advanced funds to the local committee to enable it to start work and, if need be, guaranteed it a certain financial cover; when all this had been done, Geneva announced the agency’s establishment to the National Societies.

In the course of their work, the agencies referred difficult questions to the International Committee and resolved them as directed by Geneva.

When the agencies closed down, it was the International Committee that decided what to do with any outstanding balance of funds; the respective agency’s local committee sent its accounts to Geneva, as well as its archives.

From these various indications it may be concluded that the agencies were not independent bodies, but were in effect the operational arm of the ICRC.

We must return briefly to the question of the agencies’ duties. The main purpose of the Basel Agency was to ensure the delivery of relief supplies; with the help of its delegates as convoy escorts, it fully succeeded in doing so. In Trieste, on the other hand, this work took second place, and in Belgrade it was virtually non-existent.
It should not be inferred from this that the agencies had lost their *raison d’être*.

As explained above, from the beginning of the Franco-Prussian War the Basel Agency had opened a mailing service and information bureau in favour of the prisoners and the wounded. This precedent was not forgotten.

During the Russo-Turkish War of 1877–8, the Russian Red Cross asked the ICRC to open a similar bureau, but the project was abandoned owing to the inability or the refusal of the Sublime Porte to supply information about its Russian prisoners.119

In the Serbo-Bulgarian War of 1885, detailed lists were exchanged, either through the Vienna Agency or directly between the Central Committees concerned.

During the Hispano-American War of 1898, the Lisbon Central Committee offered its services to help forward mail between prisoners and their families.120

Both sides in the Russo-Japanese War of 1904–5 did their best to provide information about prisoners during the hostilities. Lists were given to the representatives of the Protecting Powers appointed by each side (France looked after Russian interests in Japan, the United States those of Japan in Russia). Because of the slowness in communicating the lists, however, other means were also used, which led to some confusion.121 It was clear that a central body responsible for channelling all information and enquiries was essential if the work was to be done efficiently.122

The Belgrade Agency tried to fill this gap, but with only partial success, since the belligerents of 1912–13 were not all equally assiduous in supplying the information it needed.

Although the title ‘International Relief Agency’ was used from 1870 until 1913, the agencies’ work underwent a profound change: whereas the Basel Agency dealt mainly with the allotment and forwarding of relief supplies, that in Belgrade was first and foremost a prisoners-of-war information bureau.

This evolutionary process foreshadowed the role of the Agency during the two World Wars, as well as the duties assigned to it in the Geneva Conventions of 1929 and 1949.

**The International Committee’s delegations**

The Committee sent delegates to the field of battle on three occasions:

- Schleswig (1864),
- Montenegro (1876),
- the Balkans (1912–13).

These missions had very different aims. The first was primarily to gather information, to see how the October 1863 Resolutions and the proposals which the International Committee was preparing for the 1864 Diplomatic Conference were being, or might be, put into practice.
The purpose of the second mission was to form a Red Cross Society in Montenegro.

Information was again the main objective of the missions carried out by Dr de Marval and Dr Ferrière, during which the organization of voluntary relief work was studied to draw lessons for the future.

All these missions were of an exceptional nature: they took place in response to specific needs resulting from particular situations.

In so far as any ICRC policy can be discerned in all this, it appears to be one of abstention. As direct assistance to wounded soldiers was the responsibility of the National Societies, the International Committee felt that it had no role to play on the field of battle. It had made its position clear in 1870:

On several occasions, surprise has been expressed that we have not sent a representative to the theatre of hostilities; it should be superfluous to explain why we have not done so. Our place was not on the battlefield, and the Committees on either side would not have been surprised by our absence. We have remained where our duty lay, and where our presence was required by unceasing work.123

Moreover, as the Geneva Convention was a treaty between states, it was up to the contracting parties to ensure its application. Here again, the ICRC avoided any action which might be construed as an attempt to exercise supervision over the belligerents.124

A significant development occurred during the Russo-Turkish War of 1877–8: the Ottoman Red Crescent became convinced that the International Committee’s presence on the battlefield would end the violations committed by the Ottoman army, and take the wind out of the accusations both sides were levelling against each other. Despite insistent requests the Committee refused to send anyone to the theatre of hostilities, saying that it had no authority to supervise the conduct of military operations.125

Up to the First World War the ICRC did not consider that its role as a neutral intermediary gave it the authority to intervene on the battlefield and, as a general rule, did not seek to be represented there.

It would, therefore, not be correct to see the missions to Schleswig, Montenegro and the Balkans as precursors to the ICRC’s field missions during the First World War: their aims were completely different.

In my opinion, the precedent for what was to become, after 1914, one of the ICRC’s principal activities – visits to places of detention – is to be found elsewhere, namely in the field activities of the Basel Agency’s delegates sent out in chaotic conditions to accompany relief supplies and ensure their safe arrival, and to visit hospitals and prisoner-of-war camps to find out what was most urgently needed. Their work resembled the ICRC’s later missions in two respects: immediate assistance for the victims of war and unofficial enquiries about how the wounded and prisoners were faring.

It is strange that this important precedent was to remain forgotten for nearly forty years. The ICRC itself drew a veil over an initiative which proved its worth, but which went beyond its normal field of activity.
It was only in 1910 that a French scholar rescued the activities of the Basel Prisoners-of-War Agency from oblivion.\textsuperscript{126} Referring to the precedent created by them, the French Red Cross proposed to the Ninth International Conference of the Red Cross, which met in Washington in 1912, that relief for prisoners of war be channelled through the ICRC;\textsuperscript{127} this system did indeed prevail in both World Wars.

The link is thus clearly established.

\section*{Application of the Geneva Convention}

The 1864 Geneva Convention made no provision for dealing with complaints over alleged violations of its provisions. There was a legal gap which could be filled only by solutions founded on practical experience.

Some hesitation is evident, however, in ICRC practice at the time, and many moves were very tentative. Four different attitudes can be discerned:

a) In the Franco-Prussian War the Committee made a great show of not exercising any supervision over the belligerents' conduct, but it nevertheless approached the parties unofficially on two occasions to draw their attention to what it considered to be violations of the Convention and its Additional Articles; these approaches were made public after the war.

b) During the war in the Balkans and the Caucasus, apparently because its previous approaches to the Sublime Porte had been in vain, the Committee spoke out publicly over the violations ascribed to the Ottoman troops and, though observing some diplomatic niceties, took an unequivocal stand with regard to the facts and the law.

c) The Committee thereafter regularly published the complaints it received from the governments or the National Societies of the belligerent states, without commenting on the alleged facts but sometimes giving its own interpretation of the law applicable to the case in question; it likewise publicized the answers it received from the accused governments.\textsuperscript{128}

d) Lastly, in the Serbo-Bulgarian War, one of the parties sent the Committee a complaint which it passed on to the other party; the latter set up a commission of enquiry, whose findings were sent to the Committee which, in turn, transmitted them to the complainant.

The Committee pointed out that this procedure seemed particularly appropriate to ensure the proper application of the Convention, adding that exchanges of this kind were best kept confidential. It does not, however, subsequently appear to have been regularly used.

Until the eve of the First World War, the ICRC does not seem to have adopted a definite policy on dealing with complaints over alleged violations of the Geneva Convention; its practice appears undecided.

The only consistent point to emerge is that after 1876, the Committee refrained from expressing any opinion as to whether acts which might constitute violations of the Convention had indeed taken place.
10. Conclusions

In the first half century of its existence, the ICRC travelled a hesitant and sometimes surprising path.

Whereas one might have expected a straightforward and gradual progression of the organization and its activities, what happened was in fact the contrary. The audacious initiatives of the early years were followed, after the Franco-Prussian War, by an abrupt halt and then, without doubt, a definite decline. The Trieste and Vienna Agencies were but a pale shadow of their predecessor in Basel. The prestige in which the International Committee was held, by both governments and National Societies alike, dwindled to such an extent that it hardly dared to make itself heard. Efforts to assist prisoners of war, brilliantly initiated by the Basel Agency, were abandoned.

This sudden withdrawal cannot be entirely attributed to personal or geographical factors; but how else can it be explained?

Archives and public records give us no clear answer, but two explanations can be put forward.

The Red Cross had worked wonders during the Franco-Prussian War. Nonetheless, when the fighting was over all one could hear were recriminations. In France, the Paris Committee was so blatantly unprepared for its tasks that improvisation and confusion were inevitable. The Geneva Convention fell into even graver disrepute: people spoke only of the abuses and violations of the Convention – not of the thousands of wounded soldiers it had saved.

There were, regrettably, numerous abuses. On the French side in particular, soldiers and even the medical personnel were totally unaware of the Convention and its provisions. At the beginning of the war, doctors and orderlies had not been issued with the protective red cross armband; when an effort was made to put that right, things went to the other extreme, and in large areas of the country barely a house could be seen that had not hoisted the new flag of ‘universal charity’. The red cross emblem was seen as a talisman, with power to keep the Prussians at bay – and great indignation was aroused when the Prussians kept on coming. When the war had ended, it was far easier to find fault with the Geneva Convention than with those governments that had done nothing to enforce it.

Doubt spread even within the movement. Professed supporters of the Convention called for it to be repealed and replaced by national regulations which each country was invited to draw up.129

In these circumstances it is easy to understand why the International Committee should have built a wall around the Convention, and done everything to protect what already existed rather than try to launch new initiatives.

Apart from this, the status of wounded soldiers who fell into enemy hands was still unclear. The 1864 Diplomatic Conference had agreed that those recognized as unfit for further service should be repatriated, but it had failed to
settle the question of whether wounded soldiers who were captured should be regarded as prisoners of war. This idea was rejected at the first International Conference of Relief Societies for Wounded Soldiers, held in Paris in 1867; the movement probably felt that if the wounded were put on the same footing as prisoners, they would lose the benefit of their neutrality and, in consequence, the right to be sent home without waiting for the restoration of peace. On that basis, the Societies argued, could the Red Cross take the risk of extending its assistance to able-bodied prisoners, even under the emblem of the green cross?

It is impossible to judge the relative importance of these various factors. The consequences, though, are plain enough: from 1871 on, the International Committee adopted a defensive attitude which paralysed the development of its operations and kept it far removed from the realities of the battlefield. The time for daring innovation was past.

It was not until the Balkan Wars that the Committee regained the pioneering spirit which had marked its early years, and found new ways of aiding prisoners of war. But the legal framework had meanwhile changed completely: the Hague Conventions had provided a legal basis for the protection of prisoners of war and the Red Cross had decided to extend its help to them.

In the following chapter consideration will therefore be given to developments in international humanitarian law, as well as the various efforts which were made to define the role of the International Committee, its position with regard to that law and in the context of the Red Cross movement as a whole.

Notes

1 The Committee’s reluctance is apparent from many of its own statements. During the Franco-Prussian War of 1870–1, it wrote: ‘On several occasions, surprise has been expressed that we have not sent a representative to the theatre of hostilities; it should be superfluous to explain [...] why we have not done so. Our place was not on the battlefield, and the committees on either side would not have been surprised by our absence. We have remained where our duty kept us, and where our presence was required by unceasing work’ – ‘Notice sur les travaux du Comité international du 15 juillet au 30 septembre 1870’, Bulletin international des Sociétés de Secours aux Militaires blessés, no. 5, October 1870, pp. 1–13, esp. pp. 12–13. Thirty years later the Committee was to state: ‘The International Committee, devoid of any power whatsoever, had no authority to ensure the strict observance of those rules for whose adoption it had largely been responsible; its mission was limited to promoting those rules, and it had no intention of overstepping that limit’ – ‘La part du Comité international de la Croix-Rouge dans l’histoire de la Convention de Genève’, Bulletin international des Sociétés de la Croix-Rouge, no. 123, July 1900, pp. 136–47, and no. 124, October 1900, pp. 208–25, esp. p. 216.

4 *Secours aux Blessés*, p. 45; Capt. Van de Velde’s mission order, 22 March 1864, ICRC Archives, file ‘Comité international, 1863–1880’.
5 *Secours aux Blessés*, pp. 45–144 (Dr Appia) and pp. 145–77 (Capt. Van de Velde).
6 Minutes of the 13 March 1864 meeting.
8 *Secours aux Blessés*, pp. 50, 67–8, 81 and 105. It is noteworthy that sixteen volunteers sent by a Hamburg friary also wore the red cross armband, *ibid.*, p. 133; Boissier, *History of the International Committee*, p. 99.
14 It should be noted, however, that while the Committee did not officially send delegates to the field as it had done in 1864, one of its members – Dr Appia – went to the Austro-Italian front, where he and some volunteers helped look after the wounded (Boissier, *History of the International Committee*, pp. 186–90).
17 *Actes du Comité international, 1871*, p. 170.
18 *Bulletin international*, no. 6, January 1871, pp. 96–108.
22 Ibid.
23 Actes du Comité international, 1871, p. 199; Rapports de l’Agence internationale de secours aux militaires blessés, pp. 7–8 and 451–2.
24 Actes du Comité international, 1871, p. 200; Rapports de l’Agence internationale de secours aux militaires blessés, pp. 6 and 456–8.
25 The Agency’s reports give the names of fifty-one delegates; the number of missions carried out by each varied from one to six.
26 Actes du Comité international, 1871, pp. 199 and 215; in all, 84% of relief supplies were distributed directly to mobile hospitals and dressing stations (Rapports de l’Agence internationale de secours aux militaires blessés, p. 463).
27 Rapports de l’Agence internationale de secours aux militaires blessés, pp. 452–3.
30 Actes du Comité international, 1871, p. 238; Rapports de l’Agence internationale de secours aux militaires blessés, pp. 40–1, 54, 122–4 and 456–9.
31 Actes du Comité international, 1871, pp. 200 and 214; Rapports de l’Agence internationale de secours aux militaires blessés, pp. 6, 40 and 457.
34 Letter to Prof. Hubbenet, delegate of the Russian Central Committee, 25 August 1870, Actes du Comité international, 1871, pp. 184–6; see also ibid., pp. 196, 200–1 and 213–14; Rapports de l’Agence internationale de secours aux militaires blessés, pp. 107 and 158.
35 Actes du Comité international, 1871, pp. 200–1. From the little information we can gather from the Agency’s reports, it appears that several hundred doctors and nurses were redirected to the field units established by the relief societies of belligerent or neutral nations.
36 The International Committee considered that: ‘Under the terms of the resolution adopted in Berlin, the Agency should be employed only in office work …’. Actes du Comité international, 1871, p. 198.
37 Actes du Comité international, 1871, p. 221.
38 24th Circular to the Central Committees, 22 November 1870, Actes du Comité international, 1871, pp. 208–10; Bulletin international, no. 6, January 1871, pp. 92–6.
40 25th Circular to the Central Committees, 10 February 1871, Actes du Comité international, 1871, pp. 228–30.
43 Letter to H.E. General the Count de Palikao, Minister of War, 23 August 1870, Actes du Comité international, 1871, pp. 182–3.
45 Actes du Comité international, 1871, p. 194.
46 In the absence of any summary tables, it is hard to give exact figures for the Basel Agency’s work; but some figures do stand out:

- delivery of assistance in cash and kind worth about 3 million Swiss francs (this figure should be multiplied by about twenty to give an equivalent at today’s values);
- transmission of 700–800 letters per day in the winter months of 1870–1;
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- 200 enquiries daily, resulting in thirty to forty answers per day;
- the repatriation of 2680 wounded and disabled soldiers.

47 For geographical reasons, the relief societies of Great Britain, the Netherlands, Belgium and Luxembourg did not avail themselves of the Agency’s services.

48 Actes du Comité international, 1871, pp. 209 and 217.

49 Bulletins internationals, no. 24, October 1875, to no. 36, October 1878; Le Comité international de la Croix-Rouge de 1863 à 1884, Imprimerie B. Soulier, Geneva, 1884; Boissier, History of the International Committee, pp. 298–312; Knitel, Les délégations du Comité international de la Croix-Rouge, pp. 26–8; Moynier, La Croix-Rouge, pp. 131–69.

50 Bulletins internationals, no. 25, January 1876, pp. 5–6.

51 Bulletins internationals, no. 27, July 1876, pp. 117–18.

52 Bulletins internationals, no. 28, October 1876, pp. 166–9.

53 Message from the Sublime Porte to the Swiss Federal Council, 16 November 1876, Bulletins internationals, no. 29, January 1877, pp. 35–7; see also Boissier, History of the International Committee, pp. 303–7.

54 The Ottoman Empire had in any case made it known that it would be powerless to make its troops respect the Convention if its proposed emblem were not accepted. See Bulletins internationals, no. 29, January 1877, p. 36; no. 30, April 1877, p. 44.

55 Bulletins internationals, no. 29, January 1877, pp. 35–7; no. 30, April 1877, pp. 39–47; no. 31, July 1877, pp. 83–91; no. 32, October 1877, pp. 147–54.

56 An Ottoman Relief Society for Wounded Soldiers had been created in 1868, but was not active; since the death of its founder, Dr Abdullah Bey, the Society had in effect ceased to exist – Bulletins internationals, no. 27, July 1876, pp. 120–1, and no. 28, October 1876, pp. 161–4. See also Boissier, History of the International Committee, pp. 303 ff. (National Societies had begun calling themselves ‘the […] Red Cross Society’ from the early 1870s; this was encouraged by Moynier as a means of reinforcing the movement’s cohesion – Boissier, History of the International Committee, pp. 273–4.)

57 31st Circular to Central Committees, 10 February 1876, Bulletins internationals, no. 26, April 1876, pp. 66–8.

58 32nd Circular to Central Committees, 14 June 1876, Bulletins internationals, no. 27, July 1876, pp. 118–9.

59 34th Circular to Central Committees, 23 August 1876, Bulletins internationals, no. 28, October 1876, pp. 159–61.

60 40th Circular to Central Committees, 6 October 1877, Bulletins internationals, no. 32, October 1877, pp. 176–7.

61 36th Circular to Central Committees, 30 April 1877, Bulletins internationals, no. 30, April 1877, pp. 39–41.

62 Bulletins internationals, no. 25, January 1876, pp. 1–4; 31st Circular to Central Committees, 10 February 1876; Bulletins internationals, no. 26, April 1876, pp. 66–8.

63 31st Circular to Central Committees, 10 February 1876, Bulletins internationals, no. 26, April 1876, pp. 66–8.

64 Bulletins internationals, no. 25, January 1876, p. 4.


66 ‘Une mission au Monténégro, Rapport présenté au Comité international de la Croix-Rouge par ses délégués’, Bulletins internationals, no. 26, April 1876, pp. 55–70.

67 ‘Instructions pour les délégués du Comité international’ (pt. 2), Bulletins internationals, no. 26, April 1876, p. 64.

68 Knitel believes that it did (Les délégations du Comité international de la Croix-Rouge, p. 28).


70 Bulletins internationals, no. 31, July 1877, pp. 94 and 143–4; no. 33, January 1878, p. 32.

71 37th Circular to Central Committees, 14 July 1877, Bulletins internationals, no. 31, July 1877, pp. 143–6.


*Bulletin international*, no. 33, January 1878, pp. 34–5; no. 36, October 1878, p. 278.


*Bulletin international*, no. 28, October 1876, pp. 164–5 and 170–2.

‘Les destinées de la Convention de Genève pendant la guerre de Serbie”, annex to the 35th Circular to Central Committees, 21 September 1876, *Bulletin international*, no. 28, October 1876, pp. 164–76.

*Bulletin international*, no. 28, October 1876, pp. 237–9; no. 29, January 1877, pp. 34–5; no. 32, October 1877, pp. 154–70; no. 33, January 1878, pp. 11–32 and 108–12; no. 34, April 1878, pp. 119–32; no. 35, July 1878, pp. 265–7.

*Bulletin international*, no. 64, October 1885, to no. 69, January 1886, pp. 545–62.

The Serbian Red Cross Society was granted recognition on 14 June 1876, that of Bulgaria on 20 October 1885.


*Compte rendu des travaux de la Conférence internationale tenue à Berlin*, p. 254.


*Bulletin international*, no. 65, January 1886, pp. 22 and 26–8; no. 66, April 1886, pp. 101–3.

*Bulletin international*, no. 65, January 1886, p. 22; no. 66, April 1886, pp. 83, 101–3 and 172.

*Bulletin international*, no. 65, January 1886, p. 22; no. 66, April 1886, pp. 171–2.

*Bulletin international*, no. 65, January 1886, pp. 9–10; no. 67, July 1886, pp. 225–6; no. 69, January 1887, pp. 12–13. The Bulgarian allegation was leaked to the press, which caused the Committee ‘painful surprise’. The incident confirmed the Committee’s view that the exchange of communications over this kind of affair had a greater chance of success if handled discreetly.


Present-day Maputo, capital of Mozambique.

100th Circular to Central Committees, 10 March 1900, *Bulletin international*, no. 122, April 1900, pp. 57–60; Circular issued by the Central Committee of the Portuguese Red Cross, 17 March 1900, *ibid.*, pp. 120–1.

Circular issued by the Central Committee of the Portuguese Red Cross, 28 May 1900, *Bulletin international*, no. 123, July 1900, p. 191.


144th Circular to Central Committees, 16 November 1912, *Bulletin international*, no. 173, January 1913, pp. 10–12. The Agency, which was to remain operational during both Balkan Wars, was set up on the territory of a belligerent, and not in a neutral nation.


Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, *Compte rendu*, p. 318; see also Chapter IV below, pp. 71–6.

Regulation annexed to Hague Convention no. IV of 18 October 1907, Art. 14, *Handbook of the International Red Cross and Red Crescent Movement*, 13th edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, pp. 302–3; *The Laws of Armed Conflicts*, pp. 79–80. The difficulties encountered by the Belgrade Agency can also be attributed to the fact that it was located in one of the belligerent States.


Report by Dr Ferrière, *Bulletin international*, no. 175, July 1913, pp. 200–12.

To reduce the number of notes in this section, references to events already mentioned in this chapter will not be repeated.


Gustave Moynier, ‘Ce que c’est que la Croix-Rouge’, *Bulletin international*, no. 21, January 1875, pp. 1–8.


Only Peru had a Red Cross Society.

Only Japan had a Red Cross Society. The ICRC wrote at the time: ‘We are not currently thinking about setting up an international Agency […] because it does not seem necessary. In particular, there will be no call to carry out our usual delicate duties of sharing the contributed relief goods between the belligerents according to their needs since China, which has not signed the Geneva Convention and which has no relief society, cannot in our view be taken into account in this respect’, 87th Circular to Central Committees, 3 August 1894, *Bulletin international*, no. 100, October 1894, pp. 221–3.

Gustave Moynier in Basel, Professor d’Espine in Trieste, Dr de Marval in Belgrade.


122 This was F. Thormeyer's conclusion in his study on the working of the prisoners of war information bureaux in the Russo-Japanese War, Thormeyer, 'Les bureaux de renseignements', pp. 54–5.

123 Bulletin international, no. 5, October 1870, pp. 12–13; Actes du Comité international, 1871, p. 204. At the outbreak of the Franco-Prussian War Dr Appia, drawn, as ever, by the whiff of the powder-barrel, went on his own initiative to join the Prussian army field hospitals (Boissier, History of the International Committee, p. 257). The International Committee took pains to avoid any mention of this personal mission and went out of its way to stress that it had not sent a representative to the conflict area. Care for the wounded was the National Societies’ responsibility, and the Committee scrupulously avoided doing anything that might be interpreted as treading on other people’s toes.


125 ‘In 1877, the International Committee was strongly urged to send a delegate to the scene of the Russo-Turkish War, in order to closely supervise the belligerents’ application of the Geneva Convention; it refused, equally emphatically, considering that the contracting States alone had the right to exercise supervision of that nature, and to complain to the adverse party whenever necessary. No doubt the Geneva Committee was done a great honour in being attributed such prestige in the belief that its delegates might successfully carry out enquiries of this kind; the Committee itself, however, was under no such illusions’. ‘La part du Comité international de la Croix-Rouge dans l’histoire de la Convention de Genève’, Bulletin international, no. 123, July 1900, pp. 136–47, and no. 124, October 1900, pp. 208–25, esp. p. 217.


References

CHAPTER IV

THE RED CROSS IN CONFERENCES: FROM PARIS TO WASHINGTON (1867–1912)

1. Introduction

The most striking characteristic of the movement founded on the basis of the October 1863 Resolutions was, without doubt, the solidarity linking the relief societies of different countries.

Before long the societies felt the need to meet in order to pool their experience and to strengthen their ties. The First Conference of Relief Societies for Wounded Soldiers was held in Paris in 1867; it assembled not only delegates of the National Societies and the International Committee, but also representatives of the States party to the Geneva Convention.

Subsequent conferences were held in Berlin (1869), Geneva (1884), Karlsruhe (1887), Rome (1892), Vienna (1897), St Petersburg (1902), London (1907) and Washington (1912).

The National Societies jealously guarded their independence, however, and the development of the movement in institutional terms was very slow. Until the First World War no one saw the need to adopt any governing statutes; it was felt sufficient to pass resolutions clarifying and building on the general principles adopted in 1863.

The question of how far these resolutions affected the ICRC’s wartime role will be examined in the following pages.

As for the legal aspect, the 1864 Geneva Conference had shown how advantage could be taken of periods of peace to codify the law of war.

But the 1864 Convention was not left to stand alone. During the period in question two separate branches of law emerged, both of which aimed to limit the evils of war, but in different ways. For simplicity, they have come to be known by the cities where decisive progress in their codification was accomplished.

One is the Law of Geneva, which is intended first and foremost to protect the victims of war. The main stages in its development were the Geneva Convention of 22 August 1864 (revised in 1906), the Additional Articles of 20 October 1868 (which were never ratified) and the Hague Conventions for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (Convention III of 29 July 1899 and Convention X of 18 October 1907).
The other is the Law of The Hague, which sets limits on the means that can be used to inflict harm on an enemy; the Conferences of St Petersburg (1868), Brussels (1874) and The Hague (1899 and 1907) were milestones in its codification.

The first of these branches of law directly concerns the International Committee, which was and still is the main driving force in its development. While the Committee was not involved in formulating the Law of The Hague, it is necessary to consider the extent to which the Hague rules have influenced the ICRC’s function and the tasks it may be required to perform in time of war.

2. The Conferences in Paris (1867) and Berlin (1869)

The October 1863 Conference had decided that ‘The exchange of communications between the committees of the various countries shall be made for the time being through the intermediary of the Geneva Committee’. The idea had been that, once duly formed, the national committees would correspond directly with each other, and that from then on the Geneva Committee would have nothing more to do.

The delegates of 1863 were deluding themselves. In practice, it soon proved impossible to do without a central body responsible for ensuring communications between the national committees and looking after the general interests of the movement. In one form or another, the International Committee had to be maintained.

But what should its peacetime and wartime activities be? What sort of relations should it have with the National Societies? How should it best be constituted so as to carry out its duties?

The International Committee decided to submit these questions to the representatives of the Central Committees assembled in Paris. After a disorderly and fruitless discussion the Conference simply passed the question back to the International Committee, asking it to consult the National Societies themselves. On the basis of this survey, and in accordance with the Committee’s own proposals, the Berlin Conference in 1869 made the Committee responsible for producing a regular publication – the Bulletin international des Sociétés de Secours aux Blessés – and for setting up an information and mailing bureau in time of war. Other questions concerning the composition and duties of the International Committee were deferred until the following conference, originally scheduled to take place in Vienna in 1871.

The resolution on the aforesaid information bureau is relevant for this study. It would appear to respond to two concerns:

a) The need was recognized for identification of dead, wounded and captured soldiers, for after a battle the dead were hastily interred in mass
graves, without any attempt being made to identify them; there was no news either of soldiers taken prisoner, or of the wounded receiving treatment in hospitals or simply being looked after by private citizens in their own homes. Any soldiers who failed to turn up for roll call were considered missing, and their families had no way of knowing whether they were dead or alive, injured or in captivity. This was as horrifying, in terms of human distress, as the gross lack of medical care denounced by Dunant after Solferino. Could no way be found of easing the families’ agony of uncertainty by communicating lists of the dead and wounded, and of prisoners? Would it not be possible to enable prisoners and their families to write to each other? These questions were raised at the October 1863 Conference in Geneva,9 and again in Paris and Berlin.10

b) It had been agreed that in wartime, the Central Committees of neutral countries could assist the Committees in the belligerent states.11 This expression of solidarity between the national committees was in fact one of the movement’s founding principles – but how should it work in practice? Were the committees in neutral countries simply to act as each saw fit, or should one of them be placed in charge of sharing out the assistance between the belligerents – and if so, which one? The risk of uncertainty, confusion and potentially wasted effort was all too great.12 There was a clear advantage in designating one body to centralize requests for assistance and to distribute that assistance fairly, thus guaranteeing Red Cross impartiality.

The link between these two concerns was recognized at the Berlin Conference, which adopted a single resolution to address them both:

In time of war, the International Committee shall ensure that a liaison and information office is set up in a suitably chosen location, which shall facilitate, in every possible way, the exchange of communications between committees and the sending of relief supplies.13

The resolution gave the International Committee great freedom in carrying out the Conference’s wishes, enabling it to set up the liaison office itself or ask a National Society to do so, and, significantly, covered both information and relief supplies.

The importance of this resolution should not be underestimated: it laid the foundations for a Red Cross institution that has rendered unique and vital service – the Central Tracing Agency.

3. The Conferences in Geneva (1884), Karlsruhe (1887) and Vienna (1897)14

The question as to the composition and duties of the International Committee had been debated – inconclusively – in Paris and Berlin, and had
been referred to the next conference for further consideration. In fact, it remained a central issue at both subsequent Red Cross gatherings – the Third and Fourth International Conferences, held respectively in Geneva and Karlsruhe.

There was a lot at stake; at both venues, delegates were faced with two conflicting points of view, one from a National Society, the other from the ICRC itself.

The Central Committee of the Russian Red Cross proposed nothing short of a fundamental reorganization of the movement, based on three main ideas:

a) Relations between the various Red Cross institutions had to be regulated by a formal agreement.

b) This agreement, or founding charter, should give the International Committee a position of authority, recognized by the states party to the Geneva Convention.

c) The International Committee would be composed of representatives of the national committees of states party to the Convention, each having one vote; the Geneva Committee would serve as a secretariat.

In the event of war, the International Committee would have the task of fore-stalling any violations of the Convention and, if violations did occur, of helping to ensure that the Convention’s authority was restored. For this purpose, the Committee would send neutral representatives to the conflict area with the competence to investigate violations of the law.15

This proposal would have given the International Committee statutory powers vis-à-vis the National Societies; it would have made the Committee a supervisory body, with the right to monitor the belligerents’ compliance with their obligations under the Convention.

The International Committee’s proposal was far more modest: all it wanted was to confirm the status quo, which had resulted from the empirical development of the movement and which fully respected the independence of the National Societies and the ICRC.16

Between the two proposals, there was no room for compromise. Either the International Committee was assigned a position of authority, and the National Societies thereby lost the independence they had enjoyed since the start of the movement, or else their autonomy was maintained, in which case the Russian proposal collapsed. Far more was at stake than a mere reorganization of the International Committee.

From the start, the proposals gave rise to heated discussion. The Geneva Conference considered that it was not sufficiently well informed to make a decision, and once again requested the International Committee to ask for the opinions of the National Committees.17 All of them, except for the St Petersburg and Belgrade Committees, were strongly in favour of retaining their independence.18

The high point of the debate came at Karlsruhe. The main arguments in support of the Russian proposal were the ‘singular position’ of the
International Committee, and the need both to reorganize it by including in it representatives of all the states party to the Geneva Convention, and to confirm its authority in a founding charter assigning well-defined but nonetheless extensive powers to it.19

The proposal’s opponents claimed that any regulation that was not supported by the power to impose penalties amounted to nothing more than wishful thinking. They stressed the impossibility of regulating charitable activities and the importance of maintaining the autonomy both of the national committees and of the ICRC, pointing out that the weight of evidence was in favour of the status quo, since the system established in 1863 had succeeded beyond all expectations; it would, they said, be useless – and even dangerous – to try to replace it with something that might or might not work.20

When it came to the vote, the National Committees opted – by a large majority – for the International Committee’s proposal,21 and the following resolution was adopted:

In the general interests of the Red Cross, it is expedient to maintain the International Committee, which has its headquarters in Geneva, in the form it has had since the birth of the movement.

As it has done previously, it will continue to:

a) work to maintain and develop relations between the Central Committees;
b) notify the constitution of new National Societies, after ascertaining the basis on which they are founded;
c) publish the international Bulletin international…;
d) set up, in wartime, one or several international information agencies through whose good offices the National Societies can send relief, in money or in kind, for the benefit of the wounded of belligerent armies;
e) offer, in wartime, if it is required, its mediation or that of its agencies to the National Societies of belligerent countries for the forwarding of their correspondence.22

So, twenty-four years after its foundation, the position of the International Committee was at last clarified. The resolution sought only to confirm the status quo – the delegates at Karlsruhe had made that quite clear. But had they in fact achieved this?

With regard to the Committee’s wartime activities, the Karlsruhe Conference had done no more than restate Resolution IV/3 of the Berlin Conference. Since 1869 there had, however, been several important developments – the mission to Montenegro, and the work carried out for prisoners of war under the green cross emblem, to mention just two. Codification had thus failed to keep pace with ICRC practice.

*

The composition and powers of the International Committee were discussed again at the Sixth International Conference of the Red Cross, held in Vienna
in 1897. The Central Committee of the Russian Red Cross presented a document concerning sanctions to be imposed for breaches of the Geneva Convention.23

The proposal called for supervision at two levels – national and international – over implementation of the Geneva Convention:

a) Each country would be required to pass legislation setting penalties for breaches of the Convention.
b) The International Committee would be given the power to investigate alleged violations of the Convention and to settle related disputes between the conflicting parties; for this purpose, the composition of the Committee would be altered to include representatives of the National Societies.

The proposal aroused fierce opposition. The International Committee said that it had no desire for broader responsibilities, and that the informal links between it and the national committees were perfectly suited to the movement’s character and objectives. Representatives of states party to the Geneva Convention then took the floor one after another to make it clear that their governments would in no circumstances allow neutral delegates to come and check on the behaviour of soldiers and their officers. Furthermore, governments were not prepared to agree, in advance, to be bound by the verdict of a body set up to judge the conduct of their officials.

The Central Committee of the Russian Red Cross appeared to have overlooked the thorny problem of national sovereignty! As a result, the second part of its proposal was left high and dry.24

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A footnote to this episode came two years later in The Hague, at the first International Peace Conference: the Russian government delegate proposed ‘the creation of an “International Red Cross Bureau”, recognized by all the Powers and established on the principles of international law, to settle all questions concerning assistance and voluntary medical help in wartime …’.25

The proposal was rejected on the grounds that the reorganization of the Red Cross was not on the Conference agenda.26


Introduction

War is an act of violence pushed to its utmost bounds; as one side dictates the law to the other, there arises a sort of reciprocal action, which logically must lead to an extreme.28
The first half of the nineteenth century seems to have given the lie to Clausewitz’s prediction. From Waterloo to Solferino, the art of war had barely changed. Apart from the mediocrity of their leaders, the armies of Napoleon III were hardly distinguishable from those of Bonaparte.

Things were to change from about 1860: with the rise of nationalism, wars between sovereign princes were superseded by the ‘nation in arms’. Irregular forces and militias testified to the fact that the people were no longer prepared to stand by inactive while professional armies fought. The Franco-Prussian War brought a formal end to a tacit agreement dating back to the eighteenth century which kept laymen well away from the battlefield. Warfare was no longer the exclusive domain of military men.

And as the frontiers of science and technology were pushed back ever further, military uses were quickly found for virtually every invention. The Industrial Revolution allowed increasingly terrifying means of destruction to be produced in almost unlimited quantities. The arms race had begun.

At the same time, the optimism that had marked the first sixty years or so of the century began to fade as faith in mankind’s intellectual and moral progress gave way to doubt and anxiety among both people and governments.

Diplomatic means were deployed to avert the growing threat by encouraging arbitration, arms limitation and codification of the laws and customs of war. The development of the Law of The Hague, with the object of diminishing the evils of war by imposing constraints on the methods and means that could be used in conflict, was part of that process.

The St Petersburg Conference, in 1868, declared that ‘...the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable ... would be contrary to the laws of humanity’. The Conference accordingly prohibited the use of explosive bullets, or those which contained inflammable substances.29

The Brussels Conference of 1874 produced a draft declaration on the laws and customs of land warfare. It laid down general principles concerning participation in hostilities, the treatment of prisoners of war, methods of inflicting harm on the enemy and rules on occupation; however, it was never ratified.30

The first Hague Conference (1899), which promptly became known as the Peace Conference, gave a decisive impetus to the codification of the laws and customs of war. By failing to impose compulsory arbitration and disarmament, this meeting disappointed the great hopes it had aroused. It nonetheless produced two important agreements aimed at curbing the excesses of war: the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention,31 and the Convention with Respect to the Laws and Customs of War on Land,32 which took the 1874 Brussels Declaration – on which it was largely based – a step further.

In the wake of the Hague Conference the ICRC was able to achieve an important ambition: the revision of the Geneva Convention. A special confer-
ence, meeting in Geneva from 11 June to 6 July 1906, built on the experience gained since 1864 to produce a new treaty containing 33 articles: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of 6 July 1906.33

The Second Peace Conference met at The Hague in 1907, and once again the pacifists’ hopes were dashed. The proposal to create a permanent court of arbitration foundered on disagreement between the great powers, which were determined to control it, and the smaller states, which were equally determined not to put their fate in the hands of a tribunal that would be dominated by the larger ones. The disarmament issue was not addressed, for the Conference merely took note of the growing financial burden of military budgets and the development of new weapons. It did, however, give impetus to the codification of the law of war by revising both the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention34 and the Convention with Respect to the Laws and Customs of War on Land.35

The International Committee did not attend the Conferences of St Petersburg, Brussels and The Hague. In Geneva in 1906, its role was again that of a promoter – it was not represented, and its composition and duties were not discussed. Apart from an insignificant incident,56 its name was not even mentioned.

All the same, the ICRC and its work could not escape being affected by the Hague and Geneva Conferences, which inevitably also had implications for the future of the Red Cross as a whole. Two points merit special attention: the creation of information bureaux and the role of the relief societies.

**Information bureaux**

The question of establishing and forwarding lists of wounded, sick and dead soldiers, as well as lists of prisoners of war, had been of primary concern to the Red Cross since its foundation. The Berlin Conference in 1869 had adopted a resolution calling for the creation of an international relief and information agency; the wars that followed, especially the Franco-Prussian and Serbo-Bulgarian conflicts, showed very clearly the importance of such agencies.

However, these new bodies had no formal basis in law: a belligerent was under no obligation to provide the names of wounded enemy troops its forces had brought in, nor those of prisoners of war it was holding. In many cases, government offices would have been incapable of providing such information, as the prisoners were not registered.

The Hague Conference of 1899 took a first step towards solving the problem:

A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received.
This bureau is intended to answer all enquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and deaths.

It is also the duty of the information bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.37

The purpose of the article should not be misunderstood: it required the creation of national information bureaux, on the lines of those created by Prussia in the 1866 and 1870 campaigns;38 it did not compel a belligerent to pass on the information assembled by its national bureau to the adversary. It is as though the 1899 Conference ran out of steam halfway through its deliberations.

The Geneva revision conference went a step further:

As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.39

The 1907 Hague Conference adopted the same provisions concerning the wounded, sick and shipwrecked of naval forces;40 but with regard to prisoners of war it merely rounded off the previous regulation, stipulating that the individual record cards established for each prisoner be sent to the opponent after the conclusion of peace.41

Thus, the Geneva and Hague Conventions laid down two distinct sets of rules: one, applicable to the wounded, sick, shipwrecked and dead, making it obligatory to forward information during hostilities; the other, applicable to able-bodied prisoners, creating the framework for forwarding information, but not making it compulsory to do so before hostilities had ceased.

In both cases, though, the same question arose: who should be responsible for communicating this information?

The Red Cross had made it clear that with regard to the wounded and sick, it was willing and able to do so and had already provided for a special body to that effect – the International Agency. The ICRC had the task of seeing that the Agency was set up when needed.

But the question was more complex when it came to prisoners of war. The forwarding of lists of able-bodied prisoners was of obvious humanitarian
concern, a fact that the Red Cross could not fail to acknowledge, but this new sphere of activity implied a reorientation for the whole movement. Until then the Red Cross had – officially, anyway – concerned itself only with wounded and sick soldiers, since neither the 1863 Resolutions nor any subsequent ones had authorized action on behalf of able-bodied prisoners. So the question was not simply whether to create an international agency for prisoners of war, but whether to provide prisoners with assistance. At the heart of the matter was the role of the relief societies.

**Relief societies**

The 1906 Geneva Convention had placed ‘the personnel of voluntary aid societies, duly recognized and authorized by their governments …’ on an equal footing with members of the military medical services, ‘upon condition that the said personnel shall be subject to military laws and regulations …’, thereby granting them the same immunities as those to which their colleagues in the medical services of the armed forces were entitled.

For its part, the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention stipulated that ‘Hospital ships, equipped wholly or in part at the expense of … officially recognized relief societies, shall likewise be respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power …’.43

Finally, the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land also provided for intervention by relief societies:

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents, every facility for the efficient performance of their humane task within the bounds imposed by military necessaries and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.44

Thus the new Geneva Convention, as well as those of The Hague, extended an open invitation to voluntary relief efforts: officially recognized relief societies were entitled to work on behalf of the wounded, shipwrecked and prisoners of war.

Yet were these ‘relief societies’ the same in all three cases? The question needs to be looked at more closely.

In the case of assistance for wounded and sick soldiers, no one disputed the fact that this was primarily the domain of the National Red Cross Societies. Since 1864 they had rendered too many services on the battlefield for their
competence now to be cast in doubt. The 1906 Convention confirmed the existing state of affairs, which was entirely uncontested.45

The shipwrecked also came within the Red Cross ambit: the Red Cross itself had given rise to the new Convention, having repeatedly called for the adoption of such legal measures at the Paris, Berlin, Rome and Vienna Conferences.46 Furthermore, the Red Cross had been operational at sea for the first time during the recent Spanish-American War, with considerable success.47

But the situation was quite different when it came to the relief societies for prisoners of war.

Looking into the origins of these societies, we come across a familiar face – that of Henry Dunant. It was Dunant who, at the movement’s first conference in Paris in 1867, proposed extending Red Cross assistance to prisoners of war.48 But the newly founded National Societies had too many other concerns at that time to think about assuming new responsibilities. The conference noted Dunant’s proposal, but took it no further.49 Moreover, shortly before the meeting Dunant had gone bankrupt, and had been forced to resign from the Committee. He was consequently no longer in a position to plead the cause that he held so dear.50

As the Red Cross refused to take charge of assisting prisoners of war, Dunant looked for another forum to support his aims; after the Franco-Prussian War of 1870 he and some like-minded associates founded the ‘Universal Alliance for Order and Civilization’. The Alliance organized an international congress in Paris in 1872, where Dunant again spoke up on behalf of prisoners. This time he succeeded in bringing about the creation of an ‘International Executive Committee to Improve the Condition of Prisoners of War’.

This committee trod the same path which, only a few years earlier, had led to the foundation of the Red Cross and the signature of the Geneva Convention: it endeavoured, on the one hand, to encourage the creation of national committees which would alert public opinion, and on the other hand to campaign for an international agreement to protect prisoners of war. In the spring of 1874 it sent out invitations for a congress, to open on 4 May 1874; with the invitations was a draft convention.51

Then, out of the blue, Russia made a curious move: declaring that the Imperial Cabinet was preparing to take a similar initiative, Prince Gorchakov, the Foreign Minister, persuaded Dunant’s committee to withdraw its invitation; St Petersburg then invited governments to send delegates to a diplomatic congress, scheduled to start in Brussels on 27 July 1874.52 Russia submitted a draft declaration which, on the specific subject of prisoners of war, borrowed heavily from the Executive Committee’s draft – but dropped all references to relief societies.53 The Belgian delegate, Baron Lambermont, tried to have six articles relating to the societies reintroduced, but was unable to overcome the determined opposition of the diplomats and generals.54
It was a disaster for Dunant’s committee: it had not even been invited to the conference, and the Brussels Declaration made no mention of relief societies for prisoners of war. The committee was disbanded and the idea of such relief societies was nipped in the bud.55

However, the six articles which the Brussels Conference had brushed aside were to be taken up again and, with a few additions, presented by Belgium to the First Hague Peace Conference in 1899, where they were accepted almost without discussion.56

So international law gave its blessing to societies for the relief of prisoners of war, a concept which had been summarily dismissed a quarter of a century before!

This recognition placed the Red Cross in a dilemma – whether or not to take on the mandate which the Hague Conference had bestowed on these non-existent societies. The problem was raised at the Seventh International Red Cross Conference in St Petersburg, in 1902; it was still one of the main items on the agenda of the London Conference in 1907, before being finally settled in Washington in 1912.

5. St Petersburg (1902), London (1907) and Washington (1912)57

The Seventh International Red Cross Conference, meeting in St Petersburg in 1902, tried to assess the results of the first Peace Conference. What implications did the newly signed Hague Conventions have for the Red Cross?

One problem stood out – that of assistance to prisoners of war. Should special societies be created for that purpose? This idea was doomed to failure, as any such societies would remain inactive in peacetime and would fall victim to frustration and inertia. They would be perceived in the eyes of the public as a symbol of defeatism, and would neither attract the support and resources they needed, nor inspire the confidence of the military authorities.

The task obviously had to be entrusted to existing bodies – and of these, only the Red Cross was capable of overcoming the immense difficulties which would inevitably arise in aiding prisoners of war in a conflict between major powers. It had the requisite organization, thanks to its continuing peacetime activities; public support provided it with more than adequate resources, and its constant contacts with the military authorities had allowed it to develop a relationship of trust. Moreover, the Red Cross already looked after wounded and sick soldiers who themselves were prisoners of war. It was simply a matter of extending that assistance to able-bodied prisoners. Past experience showed the way forward.

This argument was driven home forcefully in the documents presented by the Russian and French Central Committees, whose conclusions were the same: only the Red Cross was in a position to carry out the duties laid down
by the Hague Regulations, and it alone could rescue prisoners of war from the abandonment and isolation which had always been the consequence of captivity.58

One difficulty might arise, however: if the Red Cross Societies agreed to provide assistance for prisoners of war, they might well lay themselves open to the charge of misusing their donors’ contributions. The solution would be to create a special commission within each National Society, which would benefit from the latter’s infrastructure and contacts without drawing on funds destined for medical assistance.59

The duties of the National Societies were clearly set out by the Paris Central Committee: ‘… to visit prisoners of war, to facilitate communication between them and their families, and to act as intermediary for assistance arriving from elsewhere.’60

As to how the assistance efforts were to be organized at the international level, this was only touched on in passing. The Russian Central Committee proposed the creation of an ‘International Information and Relief Bureau for Prisoners of War’, to be established on the basis of a diplomatic agreement.61

The International Committee took the opportunity of reminding the Conference of the services rendered by the Basel, Trieste and Vienna Agencies.62

The discussions which followed the submissions by the French and Russian Central Committees were inconclusive. Before a general solution could be reached, each National Society had to decide how far it could commit itself to aiding prisoners of war.63

The International Committee did not try to influence the decision. Its position was what might be termed ‘well-disposed neutrality’:

If the work of the Red Cross Central Committees is extended, at their own wish, to include prisoners of war, in accordance with the provisions of the Hague Regulations, the Geneva Committee remains entirely ready to help the Central Committees in this interesting and new field of activity …64

The matter was then referred to the Central Committees for further examination, with the Conference adopting the following resolution:

The National Red Cross Societies are invited to examine the question of whether they intend to undertake the care and treatment of prisoners of war under the terms of the Hague Regulations.65

So the question was tabled again at the Eighth International Red Cross Conference, held in London in 1907. But by then two additional factors had to be taken into account:

a) The National Societies had considered where their duty lay and, by an overwhelming majority, had come out in favour of helping prisoners of war.66

b) During the Russo-Japanese War, the Red Cross Societies of the belligerent nations had assisted able-bodied prisoners just as they had the wounded
and sick; the national information bureaux, laid down by Article 14 of the
Hague Regulations, had worked well on both sides – run in St Petersburg
by the Red Cross, and in Tokyo by the War Ministry.\textsuperscript{67}

These developments opened the way for an agreement. The question whether
the Red Cross should assist prisoners of war, in line with the Hague
Regulations, had already been solved in practice. As the Chairman of the
German Central Committee pointed out, the question was now merely
theoretical:

Let us not forget that prisoners of war are made up mainly of the wounded and
sick, because it is often those people who are captured. Could you imagine the
Red Cross not helping a wounded prisoner because he is a prisoner? It is
inconceivable!\textsuperscript{68}

The Russo-Japanese War had shown that it was not necessary for all national
information bureaux to be organized along the same lines. In some countries,
the National Societies could take charge of them, while in others the bureaux
would come under the responsibility of the authorities. In each case a solu-
tion could be found which suited local preferences.\textsuperscript{69}

Yet international agreement still had to be reached on how the Red Cross
Societies and the information bureaux of the belligerent nations would
coopurate.

In view of its experience in the Russo-Japanese War, in which the National
Societies of both countries had remained in direct contact, the St Petersbourg
Committee thought the question could be settled simply by maintaining
direct relations between the Societies concerned, thus removing the need for
an intermediary.\textsuperscript{70}

This sounded like wishful thinking: there could be no guarantee that in a
future conflict, the National Societies of the enemy countries would wish to
maintain direct contacts, or that even if they did, such contacts would be
permitted by the authorities.

A system had to be put in place, and a proposal to this effect was made to
the London Conference by the French Red Cross as follows: Article 15 of the
Hague Regulations specified that delegates of the relief societies for prisoners
of war ‘may be admitted to the places of internment for the purpose of distrib-
uting relief, as also to the halting places of repatriated prisoners’; this should
not, however, be taken as meaning that National Society delegates from
country A would be allowed to visit, and bring assistance to, fellow country-
men detained in enemy country B; the military authorities would not allow it.
The relief supplies would therefore be sent to the Red Cross Society of country
B for distribution. Conversely, delegates of country A’s Red Cross would visit
prisoners of war from country B, and distribute relief parcels; the relief would
be forwarded, in both directions, via the International Committee:\textsuperscript{71}

The Red Cross Society of a country at war has the unquestionable duty to concern
itself with the protection of prisoners of its own nationality taken by the enemy. It
will send them, through the intermediary of the International Committee of Geneva, those items necessary to improve their spiritual and material well-being, and try to arrange for its efforts to be reciprocated.

But should this same Society also look after the similar interests of enemy prisoners captured by its own national forces and held on its own territory? I believe that it indeed should do so, since the spirit of social solidarity demands such action; the Society could, in any case ... be reimbursed, after the war, by the Red Cross Society of the other side, for the expenses incurred on behalf of the latter's nationals who have been thus assisted. There again, the intervention of the International Committee would be required ...

This put the ICRC squarely at the centre of the debate. Its position was made clear by its Vice-President, Gustave Ador:

The International Committee will place itself entirely at the service of the Central Committees of all countries and at the service of all governments to organize, if deemed necessary ... the transmission of information and relief to prisoners of different countries ...

More than a policy statement, this was a definite offer of services, recorded by the Conference in the following resolution:

The Eighth International Red Cross Conference notes the declaration of the International Committee of Geneva that it will, if necessary, serve as an intermediary between the Central Committees, and recommends that the Red Cross Societies recognize their inherent obligation to assist prisoners of war, in conformity with the stipulations of the Hague Convention of 1899, and within the limits set by the laws and customs of their own countries.

It might be assumed that the question of assistance for prisoners of war was thus well and truly settled. But this would fail to take into account the foresight of the French Central Committee.

At the Ninth International Conference, held in Washington in 1912, the Paris Committee submitted a long report criticizing the National Societies for their tardiness in forming special commissions responsible for providing relief to prisoners of war. The paper also set out in detail how relief for prisoners should be channelled, and on this point the French Red Cross revised its earlier thinking. It said that instead of a National Society visiting enemy prisoners of war interned on its territory and bringing them assistance, the International Committee should take over this role. The logic of this was reinforced by the fact that there was a precedent – the activities of the Basel Agency, under the emblem of the green cross, during the war of 1870.

At the proposal of the French Central Committee, the Conference unanimously adopted the following resolution:

The Ninth International Red Cross Conference, considering that Red Cross Societies are naturally called upon to assist prisoners of war and in view of the recommendation expressed by the London Conference in 1907, recommends that these Societies should organize, in peacetime, ‘Special Commissions’ which, in
wartime, would collect and forward to the International Committee of Geneva relief for distribution to servicemen in captivity.

The International Committee, through the intermediary of neutral delegates accredited to the Governments concerned, shall ensure the distribution of relief to individual prisoners and shall distribute other gifts between the different prisoner of war depots, taking into account the donors’ wishes, the needs of the prisoners and directions of the military authorities. The expenses thus incurred by the International Committee shall be borne by the Red Cross Societies concerned.

The Special Prisoner of War Commissions shall get into touch with the International Committee of Geneva .... 77

Thus, it had taken three international conferences for the Red Cross to make up its mind to continue doing, officially and regularly, what it had done with great success in the Franco-Prussian War 40 years earlier!

The importance of this resolution should not, however, be underestimated; of all the decisions made by the Red Cross since 1863, it was by far the most important. The following incident shows this only too clearly.

At the end of the Spanish-American War in 1898, there was great concern about the situation of Spanish prisoners of war held by rebels in the Philippines, and the Madrid Central Committee urged the ICRC to initiate a campaign by National Societies to secure their release. But was the Red Cross really competent to intervene? The International Committee thought not, and on 21 March 1899 gave the Spanish Central Committee its opinion:

We agree with you that the situation of the Spanish prisoners in the Philippines is worthy of interest and that humanity dictates sparing no effort to obtain their release, but we do not consider that this act of philanthropy comes within the programme of the international relations of the Red Cross. This programme does not extend beyond matters relating to the improvement of the condition of sick or wounded soldiers which constitutes a speciality that our undertaking has made its own and from which it deems it wise not to deviate. We think that the existence of this institution would be compromised if we made it an instrument for solving all the humanitarian problems to which war can give rise and, for our part, we would be reluctant to urge it to extend its original task in this way ...

The Red Cross Societies have only accepted a certain community of interests for matters directly concerned with the purpose for which they were created. We are convinced that if we solicited their charity to remedy other ills, however worthy they might be, and even if they were not asked to make any material sacrifice, several would protest, at least inwardly, and would consider that advantage was being taken of the generous sentiments they are known to harbour.

You must understand, Gentlemen, that, believing this, the Committee, whose main function is to safeguard the fundamental interests of the Red Cross, would feel that it was betraying the trust of its constituents if it shared your views and brought about a collective manifestation by the Red Cross societies for the benefit of the prisoners of war whose cause you have espoused. 78

The Madrid Committee readily admitted that Geneva’s position lacked ‘neither force nor logic’. 79 Until then, the Red Cross had never taken up the cause of prisoners of war – at least, not officially.
But after the Washington Conference such a standpoint was out of date. By recognizing the competence of the Red Cross to help prisoners of war, Resolution VI set a new course for the movement; its work was soon to assume an unprecedented dimension.

The resolution also brought about a change in the relationships within the Red Cross movement.

From the start the Red Cross had been both national and international. Its success had been largely due to its ability to maintain a balance between these two extremes, avoiding the dangers posed by jealous nationalism, which would have destroyed the solidarity between the National Societies, and by exclusive internationalism, which would have severed the movement’s popular and patriotic roots. Indirectly, Resolution VI struck a new balance between those two forces to meet the new realities. While hospital care was above all a national concern, as were the Societies’ peacetime activities, assistance to prisoners of war called for much closer international co-operation.

This shift was further accentuated in that the Washington resolution replaced the earlier one agreed in London, which had confined the ICRC’s role to that of a forwarding agent for the Societies of belligerent nations, whereas the Societies themselves retained the responsibility for distributing the relief supplies. The Washington resolution, on the other hand, assigned the task of visiting prisoners, and forwarding assistance to them, to the International Committee. The Committee thereby became more than a simple intermediary – it was to be the linchpin of all efforts to assist prisoners of war.

Finally, the Washington resolution came at a crucial moment: it contained an unprecedented element of urgency, requiring that the special commissions responsible for aid to prisoners of war take up contact with the International Committee within a year. Delegates to the Conference could not ignore the warning of their French colleague: ‘Recent diplomatic complications have reminded us how unstable is peace among nations. Do not wait for the sound of gunfire to persuade you ...’.81

Yet the one-year deadline proved to be too generous: before five months had passed, the Balkan Wars brought Resolution VI brusquely into effect. Europe was already sliding towards a general conflict which no one wanted but for which everyone was assiduously preparing.

Notes


3 Compte rendu … 1863, p. 131.


5 Actes du Comité international, 1871, pp. 73–5.

6 Resolutions IV/2 and IV/3; Compte rendu de la Conférence de Berlin, pp. 221–8 and 254.

7 Compte rendu de la Conférence de Berlin, p. 228.

8 Compte rendu … 1863, pp. 27–9 and 122–3.


10 Resolution 5 of the October 1863 Conference; Compte rendu … 1863, p. 148.


12 Compte rendu de la Conférence de Berlin, p. 254.


14 Troisième Conférence internationale..., pp. 61–6, 69, 84–5 and 86; Du rôle du Comité international et des relations des Comités centraux de la Croix-Rouge, pp. 9–14; Quatrième Conférence internationale..., pp. 92–3, 95–7 and 101.

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36 *Conférence internationale de la Paix, 1899*; third part, p. 2.


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The Red Cross in Conferences

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44 Art. 15 (the text is the same in both the 1899 and 1907 Conventions).
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68 Huitième Conférence internationale..., p. 79.
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77 Resolution VI, Neuvième Conférence internationale..., p. 318; Durand, From Sarajevo to Hiroshima, pp. 21–2.
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References

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CHAPTER V

THE FIRST WORLD WAR AND ITS AFTERMATH (1914–21)

... the obsession with the harm that one hopes to inflict on the enemy too often outweighs any thought of one’s own well-being; this is the spirit of war ...
Dr Frédéric Ferrière, Bulletin international, no. 192, October 1917, p. 413

1. Introduction

In terms of scope and duration, the huge numbers of people drawn into the fighting and the means used to seek victory, the ‘Great War’ was an upheaval without precedent.

By 4 August 1914 the lights of Europe may have gone out, but the fires of war were well ablaze. In the west the fighting stopped on 11 November 1918 – but the hostilities in the east continued until the spring of 1921.

A European war at the outset, the conflict gradually spread to other continents, first with the mobilization of colonial forces by the Entente powers, then with the entry of the United States. The Russian civil war later took the conflagration to Siberia; but overall, Europe was to remain the principal battleground and was to pay the heaviest toll.

The entire youth of Europe was thrust into battle, with millions of men called up; the civilian population, too, was severely affected, by economic hardships and by occupation. And in the final collapse of eastern Europe, disaster struck entire populations – men, women and children alike.

Stalemate on the front lines led the belligerents on a constant search for new methods of warfare and means of destruction, including ever-tighter economic blockades, a deadly submarine war and poison gas. Long-established rules which set limits to the violence were flouted one after the other.

From the humanitarian point of view, the consequences were incalculable: millions of men perished in the inferno of the trenches, while hospitals overflowed with the wounded, amputees and victims of gas. Millions more struggled to survive in the grim conditions of prisoner-of-war camps, and at the same time civilians were deported, interned and taken hostage. For half of Europe the immediate post-war period was worse than the war itself: the suffering caused by anarchy and civil strife exacerbated the bitterness of defeat and the privations already endured. Whole towns were left without supplies, production and transport were paralysed and crops destroyed, leaving countless people prey to hunger and cold; epidemics settled like vultures on the graveyard of Europe to finish off the survivors, killing more people than the
war had done. Those who escaped disease faced death and mutilation in civil wars that made no distinction between combatant and non-combatant.

Out of this horror, the Red Cross was to emerge transformed. In order to accomplish their work for wounded and sick soldiers, the National Societies had to set up and run veritable networks of hospitals and dispensaries, often spread over great distances. They organized convoys to bring assistance, fitted out hospital trains, chartered ships; they played a crucial role in providing relief for prisoners of war and were instrumental in helping civilians in the worst-affected areas, as well as in combating the spread of epidemics. To achieve this, the Societies had to overhaul their own organization, creating structures staffed largely by paid employees. Millions of members had to be recruited and adequate financial support obtained.

Changes, no less profound, were also to mark the International Committee. By creating the International Prisoners-of-War Agency, by visiting prisoners and organizing relief operations, the ICRC laid the foundations of an operational framework more extensive than anything it had previously conceived. The Committee once again proved its unique value, not only as the promoter of humanitarian law but as an instrument for applying it. Its position as a neutral intermediary between the warring parties was confirmed and strengthened.

The various elements of this transformation will be examined in the following pages.

2. The legal framework

What obligations were the belligerents under when war broke out? Three legal instruments were paramount:

a) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of 6 July 1906;¹
b) the Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, of 18 October 1907;²
c) the Hague Convention (IV) respecting the Laws and Customs of War on Land, of 18 October 1907.³

These three Conventions were binding on the belligerents.⁴ But would that alone be enough to regulate their relations and to avoid any ambiguity concerning the law on the conduct of hostilities? That would have been too much to ask; the loopholes quickly appeared, and three should be mentioned here:

a) The Hague Regulations⁵ concerning prisoners of war laid down general principles rather than rules which could be immediately applied;⁶ it was impossible, when implementing these principles, to avoid divergent interpretations, leading to serious discrepancies in the treatment of prisoners.
b) Apart from some general rules regarding occupied territories, the Hague Regulations contained nothing to protect the civilian population against arbitrary treatment by the enemy; the Regulations were completely silent on the problem of civilians who happened to be on enemy territory when hostilities broke out.

c) Neither the 1906 Geneva Convention, nor the Hague Conventions of 1907, allowed for supervision, in any form; similarly, no provision was made for an intermediary to facilitate the exchange of communications between belligerents.

Treaty law was, therefore, a far from adequate guarantee of protection for the victims of war. To fill the gap, the belligerents tried to define and extend the legal protection of prisoners through a series of bilateral agreements, reached in 1917 and 1918. Unfortunately, these accords took effect too late to prevent abuse in the treatment of prisoners.

The 1906 and 1907 Conventions failed to give the International Committee any useful basis for its work, since they did not provide for any direct action by it and did not even mention the Committee.

Apart from the Conventions, there was, however, Resolution VI of the Ninth International Conference of the Red Cross, held in Washington in 1912. It required each National Society to create a special commission responsible for collecting and forwarding relief supplies for prisoners of war to the ICRC, which would then take charge of transport, allocation and distribution through neutral delegates accredited to the governments concerned. Since it was a resolution adopted by a Red Cross conference, this provision was not binding on the countries at war. It allowed the ICRC to offer its services – but it placed no obligation on governments to accept them.

The legal foundations of the Committee’s work were therefore very thin. Once again it can be seen that the gaps and imperfections in the law were to be as significant as the treaties themselves: they showed new directions for the ICRC’s work, starting with the activities provided for in Resolution VI, dealing with assistance for prisoners of war, of the Washington Conference.

Three further tasks were to appear:

a) attempts to define the scope and content of rules protecting the victims of war;

b) attempts to have civilian internees protected and treated as prisoners of war;

c) the establishment of a minimum of supervision.

It is important to note, however, that the Committee did not start its war work with any prepared plan of action. Although the missions by Dr de Marval and Dr Ferrière had allowed certain lessons to be drawn from the Balkan Wars, the ICRC was taken by surprise at the scale and duration of the conflict – as indeed were the chanceries and the general staff throughout Europe. It had to adapt to circumstances that were quite unforeseeable, and
went through a process of gradual change, guided by necessity, to modify its structures and widen its field of action.

There is no need to go into this hesitant progression in detail; more attention should be paid to the results obtained than to the trial and error necessary to achieve them.

3. The International Prisoners of War Agency

In August 1914 the ICRC wrote to all the National Societies to remind them of the pledges given under Resolution VI of the Washington Conference and to notify them of the opening, in Geneva, of the 'International Agency for Assistance and Information for Prisoners of War'. The ICRC stressed the importance of centralizing assistance for the prisoners:

To carry out useful work in this field there must be unity of approach, centralized information and one sole organization for bringing the relief to the prisoners. A dispersal of efforts would only create confusion which would be prejudicial to the prisoners' interests.

The ICRC's move came at the right time: requests for information were already pouring in as a result of the fighting in Belgium, northern France and East Prussia. The Geneva Agency had to be organized on a scale quite different from that of its predecessors; by autumn, 1200 volunteers were at work, dealing with a daily arrival of thousands of letters. As the war continued, the volunteers were gradually replaced by paid staff.

Communications with Russia proved slow, so the ICRC asked the Danish Red Cross to open an information bureau in Copenhagen to deal with matters arising from the eastern theatre of war. This bureau was sometimes referred to as a 'branch' of the Geneva Agency, but it was in fact an entirely separate body, operating under the responsibility of the Danish Red Cross.

After Italy entered the war in May 1915, the ICRC persuaded the Austrian and Italian National Societies to open their own information bureaux and to correspond via Switzerland.

The ICRC's centralization doctrine was applied, therefore, on a front-by-front basis: the Geneva Agency concentrated its efforts on the western front and played only a subsidiary role in respect of the war in the east and in the Austro-Italian theatre.

For whom was this work carried out? There were two obvious categories of beneficiaries: on the one hand, those protected by the Geneva Convention – wounded and sick soldiers, members of the medical services – and on the other, prisoners of war protected by Articles 4 to 20 of the Hague Regulations.

But was it possible to stop there? Since the war began a large number of civilians had been arrested by enemy forces, creating new categories of victims:

- civilian internees – citizens of a belligerent country who, at the start of the war, happened to be on enemy territory;
hostages – people seized to guarantee submission by the population of occupied territories;

deportees;

so-called ‘political’ detainees, arrested for breaking rules imposed by the occupying armies.

On top of this, inhabitants of the invaded territories were cut off from the outside world, while thousands had fled the conflict zone and had disappeared without trace. Should – and could – the Agency do anything for all these people?

The lack of any legal grounds would have justified leaving the problem alone; but on the other hand it was difficult to disregard the urgent requests which arrived daily at the Agency’s offices. The ICRC asked the opinion of the National Societies, without whose help any effective action would have been impossible. Some Societies were against extending, once again, the work of the Red Cross, while others pledged their co-operation; the ICRC took a deep breath and decided to open a Civilian Section within the Agency.13

This was a bold decision, and the starting point for a new development of humanitarian law.

Geographically speaking, the Agency’s work was carried out mainly for nationals of countries which were engaged on the western front, but it also played a supporting role with regard to other theatres of war. Its services for prisoners of war set up sixteen card-indexes, each for a particular nationality: the American, Belgian, Brazilian, British, French, Greek, Italian, Japanese, Portuguese, Romanian, Russian and Serbian sections, for the Entente powers, and the Austro-Hungarian, Bulgarian, German and Ottoman sections for the Central Powers.14 The Civilian Section had to look after enemy aliens interned in the belligerent countries and their dependencies, nationals of countries which were nominally at war but which took no active part in the fighting (Latin American countries, Japan, China, Siam), as well as civilians who had sought refuge in neutral countries. This section’s work took in virtually every part of the world.15

To understand exactly what the Agency did, and how it functioned, a distinction first has to be made between two basic categories of beneficiaries: military personnel (the sick and wounded, the medical corps and prisoners of war) and civilians (internees, deportees, hostages, the population of occupied territories, and refugees). The Agency’s procedures must also be examined in detail, as the process of re-establishing communication between a prisoner and his family calls for painstakingly meticulous work which cannot really be understood if looked at superficially. This is not surprising, since the bottom line of humanitarian law is the protection of individuals: every case is unique.

Military personnel

The following activities were carried out on behalf of captured servicemen (wounded, sick, medical personnel, able-bodied prisoners).
Transmitting lists of prisoners

The first lists of prisoners, relating to French soldiers held in Germany, were given to the Agency in September 1914. The ICRC then took steps to obtain lists of German and Austrian soldiers held in France and Britain. So from the autumn of that year the practice of exchanging lists of prisoners was established; the International Committee received lists from all the belligerents, with the exception of Russia (whose lists were sent to Copenhagen) and Italy (which sent them to Vienna directly, without going through the Agency in Geneva).

Following this the parties to the conflict agreed to exchange lists of prisoners through the good offices of the Protecting Powers. It could be asked whether there remained any point in transmitting lists via the Red Cross; in fact, it was still extremely necessary – not only were lists communicated far more quickly by the Red Cross than through diplomatic channels, but possession of the lists was crucial to the Agency for replying to the numerous enquiries it received from prisoners' families. The Agency also obtained a great deal of information from unofficial sources, corroborating and supplementing the official notifications it was sent. The need for this twin-track transmission of information was upheld in subsequent treaties.

Lists of prisoners received by the Agency were always sent immediately to their respective country's National Society. This often entailed making exact copies, in cases where the Agency received no duplicate; the original was kept in Geneva.

There were three types of list: those of able-bodied prisoners; those of wounded or sick prisoners, with an indication of their medical condition; and those of prisoners who had died, with information on where they had been buried.

Transcription errors were frequent, leading the ICRC to ask that the lists be written out by designated prisoners and not by officials of the detaining authority. This practice gradually came to be accepted and was confirmed in the agreements reached between the belligerents in the course of the war.

In all, 398,336 pages giving lists of prisoners were received from official sources and passed on to the National Societies concerned. Since each page carried information on twenty to twenty-five prisoners, more than eight million items of information were registered by the Geneva Agency.

Unofficial informants also provided a great deal of information (country doctors, parish priests, and the like); some ten thousand pages of lists concerning French prisoners alone arrived at the Agency from such sources.

Establishing card-indexes

The originals of the lists sent to the Agency were kept there and used as a basis for card-indexes. All items of information concerning the identity of the prisoner – but only those – were copied onto a card, which also showed the source of this information (list and page numbers). For other data concerning
the prisoner (detention camp, state of health, follow-up, and so on) it was necessary to consult the original list; possible mistakes due to faulty transcription were thus avoided.\textsuperscript{27}

The cards were then filed according to the prisoner’s nationality and, within that grouping, in alphabetical-phonetical order.\textsuperscript{28}

Requests for information about missing soldiers were recorded on cards of a different colour and filed in the relevant national indexes according to the same principles. In this way, the enquiry card was placed together with the index card on which the particulars of the missing person were recorded, thus establishing a link (in French, the ‘concordance’) between them. The information was then verified against the original document and communicated to the enquirer. By this method alone, the Agency was able to provide more than 560,000 replies to French families.\textsuperscript{29}

However, if the name of the person sought had not appeared on a list, or if it had been incorrectly written down at some stage – which frequently happened when lists were made of the dead – there was no hope that the enquiry and the information would tally. To get round this, the Agency was compelled to open two further card-indexes:

- a topographical index, where cards for dead military personnel were filed not alphabetically but according to where they had died – the battlefield, first-aid post, hospital, prison camp, and so on. If it was known roughly where a soldier was last seen, a check in the topographical index would give information on the identity tags, warrant books, gravestone inscriptions and so on which had been recorded by the medical service, local authorities or others; a missing soldier who could not be identified in the general index because of a spelling error might thus be traced in the topographical index;\textsuperscript{30}

- a regimental index, in which information on personnel in the same military unit (regiment or warship) was recorded on large cards; this index also enabled missing soldiers to be traced whenever spelling difficulties made this impossible in the general index. The regimental index also served as the main reference tool for the Tracing Service.\textsuperscript{31}

Tracing

The Agency carried out two kinds of enquiries:

- The first, concerning prisoners whose whereabouts were known, caused no particular difficulties; generally it was sufficient to contact the camp commandant, the head doctor of a hospital or the prisoner himself to obtain the information needed.

- The second category of enquiries dealt with missing people who could not be traced through the Agency’s files; the evidence of a fellow soldier was often the last resort, and here the regimental index enabled the Agency to question all members of the same regiment who had been captured during
the same battle. This approach allowed the Agency to gather some 90,000 reports concerning French soldiers alone, from fellow-prisoners interned in Germany. Most of the information obtained in this way consisted of confirmations of death.

It should be noted that in Germany, a negative response from the Agency to a tracing request was considered the equivalent of a death certificate, at least for the purpose of obtaining a pension.

The Tracing Service was also responsible for obtaining and forwarding various documents, such as death certificates, wills, powers of attorney, and so on.

Whether through consulting the card-indexes or as a result of individual enquiries, the Agency managed to pass on more than a million items of information to prisoners’ families.

Mail, parcels and money transfers

At the start of the war the Agency took on the task of forwarding letters, parcels and money orders to prisoners of war. This was accepted as being part of its traditional work, but it soon assumed such proportions that it clearly threatened to paralyse the Agency’s other activities.

The ICRC consequently approached the postal administrations of neutral countries, requesting them to take over responsibility for forwarding prisoners’ letters, parcels and money orders, and to do so free of charge. The burden was progressively shouldered by the postal services of Switzerland, the Netherlands, Denmark and Sweden. The Agency’s role became more of a secondary one (forwarding parcels when the address was incomplete, making enquiries when consignments proved impossible to deliver, etc.).

Civilians

The Agency’s work for civilians had two main characteristics:

- the great variety of situations to be addressed: there were prisoners sentenced by either criminal or military courts, administrative detainees and civilian internees, persons under house arrest, hostages, deportees, the inhabitants of occupied territories, refugees in neutral countries, and so on;
- the complete absence of any rules determining the status of civilians under the control of an enemy power.

As far as possible, the Agency sought to assist civilians in the same way as it helped prisoners of war, by

- transmitting lists of names;
- creating card-indexes;
- making enquiries and tracing missing persons;
- forwarding official documents;
- forwarding letters, parcels and money.
Nevertheless, because of the lack of any legal basis and the disparate situation faced by civilian war victims, these activities frequently came up against serious difficulties. Lists sent to the Agency were incomplete and arrived irregularly; many of its enquiries were never answered; the occupying powers put forward security reasons for preventing communication with the occupied territories ... and so on.

It was only in 1917 and 1918 that the nations at war took steps to regulate the position of civilians, through bilateral agreements negotiated under the auspices of the Protecting Powers, the Red Cross Societies of the neutral countries or the International Committee. Unfortunately, most of these agreements came too late to ease the civilian war victims’ plight.

But considering the unfavourable conditions under which it worked, the Civilians Section of the Agency achieved quite remarkable results and managed to send tens of thousands of replies to anxious relatives.

**Other services**

In addition to the services rendered by the Agency for prisoners of war, civilian detainees and prisoners’ families, two other equally important aspects of the Agency’s work also deserve mention.

The Agency’s help was called for in settling numerous individual cases: a sick prisoner needed to be examined by the Mixed Medical Commission and repatriated; another asked to be transferred to a neighbouring camp in order to be with his brother; a child had been separated from his parents when fleeing the fighting or because they had been deported. In many cases, enquiries necessitated an approach to a medical officer, a camp commandant or a military governor; this would be followed by a sustained exchange of letters. Such approaches, running into the thousands, made a significant contribution to improving the situation of the victims of the war.

Yet perhaps the most important contribution made by the Agency was the wealth of information it accumulated, enabling it to keep a ‘humanitarian chart’ of the course of the conflict. Reference to the topographical index sufficed to reveal the mortality rates recorded in the various camps; thanks to the other card-indexes, the list of names of medical personnel held in camps in violation of the Geneva Convention, of invalids eligible for repatriation or internment in a neutral country, of soldiers detained in so-called ‘reprisal’ camps, or of hostages and deportees, and so on, could be regularly updated. By painstakingly assembling, recording and evaluating all these countless items of information, the Agency put together data giving the ICRC a reliable basis for its approaches to National Societies and governments. The ICRC’s tremendous credibility among both neutral and belligerent states was largely based upon the meticulous accuracy and attention to detail of the Agency’s work.

After the guns fell silent, the Agency progressively reduced its activities. From the administrative and financial viewpoint, the Agency ceased its opera-
tions on 31 December 1919, when its accounts were integrated with those of the ICRC. But the Committee continued to make use of the Agency’s archives, and to reply to enquiries it received. From then on, the Agency was to become a permanent fixture of the ICRC itself.

4. The Committee’s delegations and visits to prison camps

At the end of 1914, the Committee appointed delegates to work in the countries at war. On 3 January 1915 Dr Carle de Marval left Switzerland for France, whereas Arthur Eugster travelled to Germany. A few days later two colleagues, Édouard Naville and Victor van Berchem, went to Britain. Their mission was to visit camps for prisoners of war and civilian internees, and to report on the detainees’ conditions.

This marked the opening of a new sphere of activity which the ICRC was to make its own. As a major development in the organization’s history, it merits closer examination.

Two questions immediately spring to mind:

a) Quite obviously the Committee did not send its delegates on the off-chance that they might accomplish something; a refusal, even from only one of the belligerents, would have had disastrous consequences. The three missions must have been prepared in advance, if only to ensure that the delegates would actually be able to see the prisoners; is it possible to retrace the negotiations leading to the missions?

b) What were the reasons that led the ICRC to take on this sensitive task, for which it appeared ill-equipped?

The ICRC’s records do not provide a complete answer. It is possible, though, to identify the main stages in the negotiations.

From 26 September to 4 October 1914 the ICRC President, Gustave Ador, was in Bordeaux, where he had talks with members of the French government and the Central Committee of the French Red Cross, both of which had been transferred there from Paris. These talks were concerned in particular with the transmission of lists of prisoners and the forwarding of correspondence and relief.

There is every reason to believe that the question of visits to prisoner-of-war camps was also raised, for soon after Mr Ador’s visit, in a letter dated 31 October, the President of the French Red Cross, the Marquis de Vogüé, relayed his government’s opposition to the idea of German prisoners of war being visited by neutral delegates. The Marquis proposed that ‘visits to Germans in France be carried out by delegates of the French Red Cross, authorized by the military authorities, while visits to French prisoners in Germany be made by delegates of the International Committee’, adding that ‘... strict reciprocity in this case is not necessary ...’. His point of view was hardly likely to be shared in Berlin!
In November, Baron d'Anthouard, Chairman of the Prisoners-of-War Commission of the French Red Cross, visited a number of prison camps in France and sent the ICRC a report which stressed the ‘excellent’ conditions in which the Germans were held. The French Red Cross asked that the report ‘be made public and communicated to the German Red Cross as an ICRC document, established on the basis of information received from the French Red Cross following ICRC enquiries’. The ICRC was not going to fall for this. The report was accordingly sent to Germany as a ‘Communication … made at the request of the French Red Cross …’. Would this report succeed – as the French Red Cross hoped – in ‘… reassuring families in Germany and putting an end to the unfounded complaints which are so often made in the German newspapers …’? It was unlikely; without questioning the Baron’s good faith, one would be justified in thinking that this report was read in Berlin with as much scepticism as a similar document from the German Red Cross would have received in Paris.

Another way had to be found to overcome the stalemate. From 9 to 16 December, Gustave Ador and Dr Ferrière visited Berlin and had discussions with the leaders of the German Red Cross and with officials of the Foreign Affairs and War Ministries; they also met the Imperial Chancellor, von Bethmann Hollweg. On the basis of what had already been agreed with the French Red Cross, arrangements were made to set up committees for assistance to prisoners of war, in both Paris and Berlin; the committees would be formed of representatives of the respective War Ministries and National Societies, the Protecting Powers (Spain and the United States) and the ICRC. The committees’ task would be to ‘visit prison camps in both countries, study the prisoners’ needs, and to report on their treatment’. It seems clear that the responsibility for carrying out the visits rested with the neutral members of these committees, in other words representatives of the Protecting Powers and the ICRC; in practice, however, the ICRC’s delegates acted independently.

During their stay in Germany, Ador and Ferrière took the opportunity of visiting prison camps at Magdeburg, Torgau and Zossen. The results of their negotiations, as well as the ICRC’s findings in the prison camps, were communicated to the French Red Cross in a letter dated 19 December 1914. On the previous day, the German Red Cross had confirmed the imperial government’s consent for visits to prison camps by neutral delegates. The way was clear for the ICRC delegates to take up their posts.

It seems certain that the ICRC conducted similar negotiations with the British, although current research has failed to find any record of them.

But what made the ICRC decide to shoulder these new responsibilities? In its publications, the ICRC has sought to link its initiative over prisoners to the mandate it received in Resolution VI of the Washington Conference.
Under the terms of the resolution, the International Committee was responsible for transporting and distributing relief for prisoners of war ‘through the intermediary of neutral delegates accredited to the governments concerned.’ The Committee’s purpose in sending delegates to the prison camps would accordingly have been to oversee the distribution of relief supplies.

At first sight, this explanation seems convincing, since the question of assistance was certainly discussed during the meetings in Bordeaux and Berlin, and the dispatch of collective relief supplies would obviously imply the exercise of outside supervision.

Nonetheless, it is not convincing enough. It was seen earlier that, at about the same time, the ICRC had already asked other intermediaries, in particular the postal administrations of neutral countries, to take over the task of forwarding assistance. Furthermore, the delegates’ reports reveal that the question of assistance was not their main concern: they were more interested in trying to obtain as complete a picture as possible of the prisoners’ conditions. This is reflected in the term ‘inspections’, often used at the time. A letter from Gustave Ador moreover acknowledges that his delegate in Germany, Mr Eugster, had complained of having nothing to distribute!

Another explanation has to be found, and for this the problem must be placed in its historical context, focusing on the situation in the autumn of 1914. Following the battle of the Marne, most people – governments, military commanders, the public – realized that the war was going to be a long one. Mobility – the key to swift victory – had come to a halt in the mud of the trenches and the barbed wire entanglements. Europe settled down to a war of attrition – not to say exhaustion – which was likely to last months or even years.

As this truth dawned, the most pressing humanitarian concern was for the fate of the prisoners, who already numbered several hundreds of thousands, captured during the fighting in East Prussia, Belgium and France. No plans had been made to shelter, clothe and feed them; camps had to be built, supplies organized, medical care arranged, and so on. At the onset of winter, most of the prisoners had only the summer uniforms they were captured in, back in August or September. Conditions for the civilian internees were no better.

News of these difficulties gave rise to the most fantastic rumours which were readily believed by a tense and credulous public; governments gave in to pressure for retaliatory measures, and the spiral of reprisals and counter-reprisals threatened to unravel the whole fabric of legal protection.

Visits to prison camps by neutral and impartial observers had two main objectives:

- to urge the belligerents to make whatever improvements were necessary to the prisoners’ conditions;
- to provide objective reports on the prisoners’ conditions to governments and the prisoners’ families.
But there was more to it than that: by providing objective and impartial reports to governments and the general public, the International Committee hoped to put an end to the prevailing irresponsible propaganda over prisoners, and in so doing prevent any further retaliatory measures against them. This aim could not be stated in as many words because of the ICRC’s desire not to upset the governments concerned – but it was nevertheless alluded to in some of the Committee’s statements:

... these visits, carrying the greatest guarantees of independence and impartiality, are intended to reassure families by informing them of the real situation – too often distorted by a tendentious Press – and to bring about, where possible, a salutary lessening of tension between the opposing governments ...65

This concern explains why the ICRC had its delegates’ reports circulated as widely as possible: they were sent as a matter of course to the news agencies and to all the subscribers of the Bulletin international; they were also sold at bookshops, with some series being reprinted.

The visits by neutral observers to prison camps on both sides in the war also aimed at achieving a certain parity in the way prisoners of war were treated, to obtain a degree of ‘reciprocal benefit’ that could only work in the prisoners’ favour.66

When they began, the visits by representatives of the Protecting Powers and the ICRC had no legal basis other than the assent, on specific occasions, of the governments concerned. The agreements reached between the belligerents during the latter part of the war took account of the work already done and allowed for visits to places of detention by delegates of the Protecting Powers and those of ‘neutral Red Cross Societies’.67

The procedure followed during the visits can be deduced from the ICRC delegates’ reports.68

Although the circumstances in which the visits were conducted varied according to the countries concerned and the conditions prevailing in each place of detention, the delegates clearly all went about their work in the same way. It is therefore possible to reconstruct a typical visit.

The delegates would start by holding general discussions with the services responsible for prisoner of war and civilian internee camps (War Ministry, Interior Ministry, etc.), as well as the Red Cross Society; they found out as much as they could about the rules and regulations concerning the conditions of detention, and then drew up a list of camps they wished to visit.

Next came the visit proper: the delegates would inspect all the facilities, including the sleeping accommodation, workshops, refectory, kitchen, infirmary, washrooms, lavatories, disciplinary cells, food and parcel stores, exercise area, and so on. The delegates were thus able to gain a complete idea of the material conditions in each camp. Although the reports were usually written in general terms, certain specific remarks – such as comparing the calorie content of food rations in the different camps, or listing the death and sickness rates – shows that the visits were carried out with scientific precision.69
Throughout the visits, the delegates had discussions with groups of detainees; the possibility to speak freely with them had been considered highly important from the time the visits began. The ICRC in fact stated several times that it would not carry out any new visits unless it received assurances that its delegates could converse in private with the prisoners of their choice. This was seen as an essential condition: ‘For our inspections to be worthwhile and offer the guarantees without which we would not undertake them, our delegates must have the assurance of being able to speak freely with the prisoners.’

Visits to places of detention and the private discussions with the prisoners enabled the delegates to build up a precise, complete and detailed picture of the conditions in the camps.

At the end of the visit the delegates met the camp commandant and told him of their observations and suggestions and passed on any requests or complaints from the prisoners. Major issues were raised with the relevant ministries after the visit, and in the case of any particularly serious incidents, the delegates would call for an enquiry.

The delegates’ final report was usually in three parts: a general section outlining the factors common to all the camps visited; a section describing the particular conditions at each camp; and lastly the delegates’ conclusions, stating the improvements which they felt should be made regarding the prisoners’ treatment and conditions. The reports were sent to the ICRC, which then published them as official documents.

During the war and in the immediate post-war period, fifty-four missions were undertaken for the ICRC in the following places: Austria-Hungary, Britain, Bulgaria, Czechoslovakia, France, Germany, Greece, Italy, Poland, Romania, Russia, Serbia, Turkey, and the Ukraine; Burma, India, Japan and Siberia; Algeria, Egypt, Morocco and Tunisia.

The delegates carried out 524 visits to places of detention. The figure appears impressive, considering that the ICRC had no legal basis for making the visits, and that each mission had to be negotiated individually; this task was made all the more difficult by the fact that none of the belligerents was prepared to agree unless it had the assurance that its enemies would do the same. But of course, set against the total number of prisoners that were taken, and the length of their captivity, the number of visits seems almost derisory; the ICRC was certainly not in a position to exercise overall supervision of the camps on a systematic and regular basis.

The question arises why the ICRC did not do more to obtain permission for its delegates to make regular visits to all the camps. The following circumstances provide the answer:

a) ICRC delegates carried out a large number of visits in 1915, when representatives of the Protecting Powers were beginning to visit prison camps, and in 1919, after these Powers had given up their mandate; in the intervening years, ICRC visits were fewer.
b) In the spring of 1917, ICRC delegates visited eight camps where Allied prisoners of war were held in Bulgaria; a year later the ICRC decided to send another mission there, because ‘visits by the Dutch delegation had not been authorized by the Bulgarian government’.76

So while the Committee thought that neutral supervision of the treatment of prisoners of war and civilian internees was essential, and where need be had done whatever it could to bring this about, it had not, on the other hand, felt it necessary to send its own delegates to places which were already visited regularly by the Protecting Powers. This conclusion was all the more natural in that the said Powers sent copies of their reports to the ICRC, which was therefore adequately informed of the situation.77

Is it possible to judge what good these visits did? In its publications, the ICRC made much of the ‘moral support’ the visits gave to the prisoners by providing a contact with the outside world, and the many improvements in their conditions of detention as a result of the delegates’ requests and recommendations.78

These benefits are beyond doubt, even though they are impossible to assess. But the really important result lay elsewhere: it was the fact that action by the Protecting Powers, the National Societies of neutral countries and the ICRC succeeded in breaking the vicious circle of reprisals and counter-reprisals to which the belligerents were inextricably committed; this uncontrolled spiral into anarchy was leading, through implacable reciprocity and with almost mathematical inevitability, to the collapse of the legal system of protection.

For the prisoners, a legally based system, supervised by independent bodies, made all the difference between decent conditions – however Spartan – and hell.

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The International Committee had no mandate to do anything on behalf of civilians living in occupied territories, who were virtually cut off from the rest of the world and who had been subjected to extreme restrictions and hardships; it could not, however, turn a blind eye to their plight.

On several occasions the ICRC tried to send missions to these areas. Gustave Ador proposed going to Belgium and northern France himself, but his requests were dismissed by Berlin. Attempts to visit occupied Serbia were similarly rejected. The fact was that in every theatre of war, it was the Central Powers which had occupied enemy territory, making it pointless to invoke the argument of reciprocal interest.79

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While itinerant missions from Geneva were quite adequate for visiting internment camps, a more permanent structure was required when it came to
distributing and supervising large quantities of relief supplies. By 1917 the worsening food situation in most of Europe was having alarming consequences for prisoners; assistance once again became the top humanitarian priority.

In response to the problem the International Committee opened permanent delegations in several places, including Salonika, Berlin, Petrograd, Warsaw, Vienna, Budapest, Vladivostok and Moscow. They dealt mainly with the handling of relief supplies, and later with the repatriation of prisoners of war; these activities are described in detail below.

5. Relief operations

Article 15 of the Hague Regulations authorized the activities of relief societies for prisoners of war. But in fact, for reasons explained earlier, these societies did not exist, and the Red Cross had decided to take over their mandate – this was the purpose of Resolution VI adopted in Washington. According to this resolution, the ICRC’s role would be to arrange the transport and distribution of relief supplies entrusted to it, acting as a relay between each National Society and prisoners of the same nationality.

The ICRC dealt with two kinds of relief supplies: individual parcels, addressed to specific prisoners, and collective consignments.

It had already created the appropriate structure for dealing with individual parcels – the Agency. However, the forwarding of parcels soon took on such gigantic proportions that it threatened to swamp the Agency entirely. Furthermore, the Agency’s services as an essential intermediary were no longer needed once a family knew exactly where to send a parcel. In autumn of 1914, the ICRC was able to pass on most of this work to the postal administrations of neutral countries, and from then on the Agency no longer accepted parcels which could be sent by normal post.

However, many prisoners received nothing from home, because their families were either too poor or lived in occupied areas with no possibility of communicating with the outside world. The ICRC’s answer was to take steps to organize collective relief consignments; the first of these passed through Geneva by rail in December 1914. Under the terms of Resolution VI, the ICRC should have been responsible for distributing these supplies, but it handed this task over to the National Societies in the beneficiary countries.

The Committee thus played a decisive role in launching relief operations at both the individual and collective levels; it did not, however, seek to create a special position for itself in this field, but instead arranged, where possible, for other bodies to carry them out.

Things were not to remain quite so straightforward. The routing of assistance from the National Societies through the ICRC to the prisoners, as envisaged in Washington, had to be re-thought before the end of the war to take account of changing circumstances. From 1917 on, events in Russia left the
Russian Red Cross paralysed, and Russian prisoners of war hard hit by the famine in Germany and Austria were thus deprived of any assistance from their homeland. German and Austro-Hungarian prisoners soon found themselves in a similar position because of food shortages and the political upheavals in central Europe.

Meanwhile, the Russian civil war, the collapse of the Dual Monarchy and the continued enforcement of the blockade after the Armistice led to increased suffering among the civilian population. The effects of the famine and scarcity of other essentials were beyond description: whole towns were cut off from supplies, medicines were non-existent, hospitals wards were without heat, epidemics of influenza and typhus cut through the enfeebled population like a scythe; in a few months, there were more deaths from epidemics than from four years of fighting.

While the ICRC could hardly ignore such suffering, its scant resources ruled out any large-scale relief operations. It did, however, take a variety of measures which can be grouped under four main headings:

Information

Thanks to its delegations in Berlin, Warsaw, Vienna, Budapest, Bucharest, Constantinople, Vladivostok and elsewhere the Committee was able to provide governments and relief organizations with detailed information about the situation in central and southern Europe, as well as Siberia; the delegations’ reports were an important source of information for the early relief operations of the League of Red Cross Societies and the League of Nations.86

Co-ordination

The ICRC was asked on several occasions to co-ordinate the work of public and private organizations which were providing relief for stricken areas or striving to control the epidemics. Among these was the Central Bureau to Combat Epidemics in Eastern Europe, which met in Vienna under the auspices of the ICRC, grouping experts from Poland, Austria, Hungary, Romania, Czechoslovakia, Yugoslavia and Italy; this bureau was the cornerstone of a concerted effort to halt the spread of typhus by setting up a network of quarantine and disinfection centres on all main roads.87

Advocacy

The ICRC repeatedly drew the attention of the victorious nations to the situation in the lands of the former Central Powers and in Russia; there was, notably, the appeal of 10 March 1919 to the Peace Conference, in which the Committee called for the lifting of the blockade, at least for medical supplies, as well as an emergency operation to supply the hospitals in central Europe.88
Direct intervention

A number of relief operations were carried out by the ICRC, using its own resources, to help the civilian population (supplying hospitals, running soup kitchens, setting up or equipping homes for children, and so on) and prisoners of war (providing food for Russian prisoners of war in Germany, organizing transit, disinfection and recuperation centres for returnees, and so on). The most spectacular operation was without any doubt the mission from March 1919 to June 1921 to assist prisoners of war in Siberia and organize their repatriation.89

In assistance work, too, the position of the ICRC thus changed fundamentally during the war and the immediate post-war period. From being simply an intermediary – or perhaps more correctly, a relay – the Committee was impelled to take up new activities in aid of both prisoners of war and civilians.

6. The ICRC and the repatriation of prisoners

The ICRC began to address problems relating to the repatriation of prisoners as early as the autumn of 1914, and continued to do so until 1921. There were, however, two quite distinct categories of prisoners involved:

- those to be repatriated during the war; and
- those to be repatriated at the end of the war.

Repatriations during the war

Customary law and the Hague Regulations stipulated that prisoners of war must be sent home as speedily as possible after the conclusion of peace. Repatriation during hostilities could, however, be considered for the following groups of people:

a) Medical personnel: Article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of 6 July 1906, required that military medical personnel, as well as members of relief societies, be repatriated as soon as their services were no longer indispensable for the care of the wounded.

b) Invalids: Article 2 of the Geneva Convention allowed the detaining powers to send home wounded or sick prisoners of war.

c) Civilians: The First World War brought about an unprecedented situation, the mass internment of enemy aliens. Although their status was not specifically defined in law, the basic distinction that had to be made between combatants and non-combatants applied to them, too. So while it might be justified to intern men of an age to serve in the army, it appeared clear that women, children, the sick and the elderly had to be repatriated.
Prisoners of war in prolonged captivity: The very long period of detention experienced by soldiers captured at the beginning of the war gave rise to a condition (neurasthenia, anorexia, muscular atrophy, and the like) that has sometimes been referred to as ‘barbed-wire syndrome’; this led to a marked impairment of the prisoners’ physical and mental faculties, and the ICRC felt that these men, no longer capable of rejoining the ranks, should be sent home.

So even while the war was still going on, it was possible to envisage repatriating a large number of prisoners. There was also the option of sending them for internment in a neutral country, which appeared – and rightly so – a less severe solution than remaining a prisoner in enemy hands.

The International Committee could not turn a blind eye to the fate of these prisoners, particularly those who were protected by the Geneva Convention, namely medical personnel and invalids. It took action at two levels:

a) On the diplomatic front, the Committee called for people eligible for repatriation during hostilities to be sent home: there was, for example, its statement concerning the return of medical personnel and its appeal of 26 April 1917, in which it requested the repatriation of prisoners who had undergone prolonged captivity. Similarly the Committee conducted negotiations for the exchange of prisoners and civilians, which was one of the purposes of Gustave Ador’s missions to Bordeaux and Berlin in the autumn of 1914. It would appear, however, that in these discussions the ICRC’s role was more one of an unofficial broker, seeking to pave the way for an agreement between the opposing nations: once conditions were favourable, the ICRC was happy to let a more official intermediary (usually the Swiss government) take responsibility for finalizing the accord.

b) On a practical level, the ICRC’s role was limited but nonetheless crucial, consisting of drawing up lists of people who were eligible for repatriation. These lists, constantly updated by the Agency, were the indispensable reference for every agreement between the warring countries.

The Committee took no part, though, in carrying out the repatriations (organizing convoys, providing supplies and medical care during the journey, and so on); this was done by the National Societies and the authorities of the transit countries (Switzerland, the Netherlands, Denmark and Sweden).

There are no exact statistics for these operations, but from available records we know that several hundred thousand people were brought home before the war ended.

Repatriations at the end of the war

When the Central Powers called for an armistice there were between seven and eight million prisoners being held by the warring countries. Most of them were in captivity in Europe, but many had been transferred to North Africa,
the Middle East, India, Central Asia and Siberia. The immense problems in repatriating such a huge number of people were obvious: the establishment of new borders had disrupted communications, vast areas of land had been devastated, on the railways rolling stock was severely dilapidated and coal was virtually unobtainable. These practical difficulties were compounded by the political situation: civil war had broken out in several parts of the former Russian Empire, Germany was in the throes of revolutionary upheaval and the Austro-Hungarian Empire was falling apart.

How, in these conditions, were the prisoners ever to be brought home, and what could the ICRC do to help? Three separate operations can be distinguished, covering:

a) Allied prisoners held on the territory of the former Central Powers;
b) former Central Power prisoners held by the Allied and Associated Powers;
c) Russian prisoners held in Europe and former Central Power prisoners held in the Soviet Union.

**Allied prisoners held on the territory of the former Central Powers**

The armistice agreements signed in 1918 between the Allied and Associated Powers and, in turn, Bulgaria (29 September), the Ottoman Empire (30 October), Austria-Hungary (3 November) and Germany (14 November), called for the immediate and unilateral repatriation of all prisoners of war belonging to the victorious nations.95 This was carried out during the winter of 1918–19 under the supervision of an Allied Commission; the ICRC was not involved at all.96

**Former Central Power prisoners held by the Allied and Associated Powers**

Conversely, the repatriation of prisoners of war belonging to the former Central Powers was deferred until after the signing of a peace treaty.97

But the negotiation of these treaties was to take a long time: the treaty with Germany was signed at Versailles on 28 June 1919; those with Austria, Bulgaria, Hungary and Turkey were signed, respectively, at Saint-Germain on 10 September and at Neuilly on 27 November 1919, at Trianon on 4 June and at Sèvres on 11 August 1920.

Furthermore, Articles 214 and 215 of the Treaty of Versailles made the repatriation conditional on the agreement coming into force. So more than six months after the cessation of hostilities, the repatriation of prisoners was postponed indefinitely.98

Concerned about the human cost of this continuing delay, the International Committee wrote to the Allied Supreme Council on 22 August 1919 and urged the rapid repatriation of prisoners of war held by the Entente powers.99 On 28 August the Council authorized the release of German prisoners.100 Over the following months Britain, the United States, Italy and Serbia repatri-
ated those held by them. France, on the other hand, waited until the Treaty of Versailles came into effect before doing likewise.\textsuperscript{101}

On 18 October the ICRC made fresh approaches to the Supreme Council to request the repatriation of Austrian, Hungarian, Bulgarian and Turkish prisoners; it stressed the particular hardships suffered by prisoners held in Siberia.\textsuperscript{102} The Secretary-General of the Peace Conference replied, saying that a comprehensive repatriation plan for all prisoners was about to be drawn up;\textsuperscript{103} however, nothing was ever seen of this plan. It was only in the spring of 1920 that the League of Nations took charge of the repatriation of prisoners of war and appointed the renowned Norwegian explorer Fridtjof Nansen to carry it out in co-operation with the ICRC.\textsuperscript{104}

**Russian prisoners held in central Europe and former Central Power prisoners held in the Soviet Union**

The situation of prisoners captured on the eastern front was far more complex; it is impossible to separate their fate from the political turmoil in central and eastern Europe and in the former Russian Empire.

The Treaty of Brest-Litovsk (3 March 1918) between the Central Powers and Russia’s new Soviet government opened the way for the immediate repatriation of all nationals of the signatory states.\textsuperscript{105} However, because of the Russian civil war only a very small number of prisoners were actually sent home.

In the winter of 1918–19, a great many prisoners took advantage of the chaos reigning in Germany, in the collapsing Austro-Hungarian Empire and in Russia to try to make their own way home. They did so in appalling conditions: weakened by years of captivity and hardships, infested with vermin, their clothes and shoes in tatters, forced to steal food for their survival, ignorant of the new borders and often of their own new nationality, many of them died on the way, victims of exhaustion, sickness and deprivation; others ended up by returning to the camps from which they had escaped. This uncontrolled ebb and flow of people helped to spread the epidemics of influenza and typhus even further.

When the Armistice agreement between the Allies and Germany was extended (16 January 1919), an Allied Commission was established to work in Germany, with the task of supervising the return of Russian prisoners of war.\textsuperscript{106} But the Commission simply banned all repatriations between the two countries.\textsuperscript{107} This was a political response: most of the Russian prisoners in Germany were suspected of being Bolshevik sympathizers, and the Allies feared that by sending them home they would be providing fresh troops for the Soviet government, with which they were de facto in a situation of conflict.

The Allied Commission was dissolved in February 1920 after the Treaty of Versailles came into force.\textsuperscript{108}

All this meant that the repatriations between eastern Europe and Soviet Russia were suspended for more than a year. Three groups of prisoners were
affected by the delay: Russians held in Germany and in the territories of the former Austro-Hungarian Empire; German and Austro-Hungarian prisoners held in Russia, mostly in areas controlled by the Soviet government; and other German and Austro-Hungarian prisoners of war held in parts of Siberia under the control of the counter-revolutionary leader Admiral Kolchak or the Japanese expeditionary force.

In the winter of 1918–19 the ICRC, foreseeing this problem of staggering proportions, had already begun putting together a plan to feed and evacuate Russian prisoners held in central Europe. To carry out the plan the ICRC opened several permanent delegations in central and eastern Europe. However, the operation failed to materialize because of the Allied Commission’s refusal to allow repatriations to areas controlled by the Soviet government. The ICRC, on the other hand, felt strongly that the prisoners should be sent back to their native districts or elsewhere if they so wished, and that their repatriation should not be delayed for political reasons.

The International Committee lost no opportunity ... of pointing out the absolute necessity of repatriating Russian prisoners of war from all the countries where they were still held, and to return them to their place of origin, regardless of whether the place in question was within the territory of the Soviet Republic or in areas controlled by the anti-Bolshevik armies. The only criterion for the repatriation was the prisoners' heartfelt wish, expressed everywhere, to return home.

The situation faced by German and Austro-Hungarian prisoners of war captured on the eastern front and transferred to Siberia was far more alarming, and their case was made worse by the Allies’ postponement of their repatriation until the peace treaties had come into force. On 8 October 1919 the International Committee asked the Allied Supreme Council to take urgent steps to bring these prisoners home, but despite the assurances given nothing was done. The Committee reiterated its request on 22 November, but it was not until 23 March 1920 that the Supreme Council authorized the repatriation of all prisoners, whatever their nationality, who were still in Siberia. By then, however, the Allies no longer had any control over events in eastern Siberia, as the area had come under the authority of the Soviet government.

Then on 11 April 1920, the Council of the League of Nations appointed Dr Nansen as High Commissioner, to take overall responsibility for the repatriation of prisoners of war. Once the political obstacles had been removed it was possible to get down to practical arrangements. The German, Austrian and Hungarian governments asked the ICRC to negotiate with the Soviet authorities for the return of prisoners captured on the eastern front. On 17 and 18 May Dr Nansen and representatives of the German, Austrian, Hungarian and Soviet governments met in Berlin, at the ICRC’s invitation, and procedures for the repatriation were established.
The operations were carried out mainly by sea, using three routes:

- across the Baltic Sea, from Narva (Estonia) or Björkö (Finland) to Stettin (Germany);
- through the Bosphorus and Dardanelles Straits, from Novorossiysk on the Black Sea to Trieste;
- across the Pacific, from Vladivostok to Trieste.\textsuperscript{119}

Other repatriations were carried out by train via Lithuania, Latvia or Poland.\textsuperscript{120}

The International Committee’s role was to conduct the negotiations with the transit countries, draw up lists of returnees and settle the necessary formalities with the immigration authorities.\textsuperscript{121} The ICRC’s delegation in Vladivostok was also instructed, at the request of the Austrian and Hungarian governments, to prepare identity documents to enable the prisoners to board ship.\textsuperscript{122} Moreover, the ICRC organized transit camps and disinfection centres, and chartered some of the transport needed,\textsuperscript{123} the expenses being shared with the governments concerned and the League of Nations.

By the end of the operation, some 425,000 Russian, German, Austrian and Hungarian prisoners had been returned home under the ICRC’s auspices.\textsuperscript{124}

7. The ICRC and the interpretation of humanitarian law

One of the main problems encountered in the application of the Hague and Geneva Conventions was that their terms were too general. Rather than laying down rules which could be applied immediately, these agreements established general principles, leaving their implementation to the goodwill of those who signed them. This led to serious discrepancies in the treatment granted to prisoners and provoked heated recriminations between the belligerents, who sought satisfaction through reprisals. The net result was that the whole framework of legal protection risked breaking down because the law was too vague.

The International Committee appears to have tried in two ways to stop this happening.

a) In concrete terms, the ICRC’s visits to prison camps and the reports prepared by its delegates helped to ensure some uniformity in the conditions of detention. The ICRC was well aware of the importance of this, hence its instructions in the spring of 1915 to its delegates in France and Germany (de Marval and Eugster) to carry out a series of visits together to camps in both countries.\textsuperscript{125} These joint visits provided an opportunity to make a unique comparison, with the aim of obtaining similar treatment for prisoners on both sides of the front.\textsuperscript{126}
b) The Committee also tackled the problem on the theoretical level, and on several occasions offered the warring parties its own interpretation of the law. Two examples of this were:

- the note dated 7 December 1914, addressed to all governments and communicated to National Societies, in which the ICRC set out what it judged to be the correct interpretation of articles in the Geneva Convention concerning the return of captured medical personnel. It listed the categories of people whom it felt were entitled to benefit from the Convention, as well as the circumstances which would make it obligatory to repatriate medical personnel of the armed forces and Red Cross auxiliaries;127

- the circular of 15 January 1915, addressed to Central Committees and, through them, to the governments, entitled ‘Equality of treatment for military and civilian prisoners of war’. Here the ICRC proposed a set of practical measures which it felt would lead to a fair application of the Hague Convention; it expressed the hope that its proposals would ‘lead to agreement between the belligerents on granting the same treatment to all prisoners of war’.128

The question arises as to the legal weight of the ICRC’s opinions. Certainly, interpretations of the Hague and Geneva Conventions given by a body devoid of any arbitral or judicial authority could not be binding on the parties to the conflict. Such pronouncements were no substitute for agreements between the belligerents which imposed obligations on the contracting states.129 Experience showed, however, that bilateral agreements were reached with great difficulty and only after considerable delays: it was not until 1917 and 1918 that the nations at war were able to conclude detailed accords spelling out the practical implications of the principles enshrined in the Hague and Geneva Conventions.

At the same time it would be wrong to assume that the ICRC’s interpretations had no legal weight because of their lack of binding force. By giving an independent opinion of how the Conventions should be interpreted, the ICRC helped to narrow the differences between the adversaries. For governments which perceived some advantage in correcting the disparities in the treatment of prisoners, the ICRC’s proposals represented a point of convergence; the record shows that governments did not ignore the Committee’s suggestions.130

Furthermore, in putting forward its own interpretations, the ICRC compelled the governments to take a position themselves and to say what practical measures they intended taking to apply the law. The governments’ responses formed the starting-point for negotiations and marked out a certain common ground.

It is clear that, whether by its legal interpretations or by practical steps such as visiting prison camps, the ICRC helped to overcome the divergences between governments and to promote a more uniform application of the
Geneva and Hague Conventions. It is also certain that the governments did not consider that the Committee had overstepped its authority – indeed, they often made reference to the ICRC’s interpretations.

8. The ICRC and violations of humanitarian law

Article 28 of the Geneva Convention of 6 July 1906 obliged the signatories to take national measures to repress and punish breaches of the Convention. Similarly, Article 3 of the Fourth Hague Convention of 18 October 1907, respecting the Laws and Customs of War on Land, stated that a belligerent had to pay compensation for breaches committed by its armed forces, thereby laying down the principle of what had to be done at an international level in the event of violations of the Convention – but this principle was unlikely to be applied during hostilities. So neither treaty specified how complaints about violations should be dealt with in the actual course of a conflict.

The International Committee therefore stuck to its former practice: when a National Society or government sent it a complaint, the ICRC passed it on to the alleged wrongdoer and asked for an enquiry to be held; it then sent the plaintiff any resulting reply, explanation or apology. In assuming this task, the ICRC did not intend to take a stance with regard to the material facts, which it had neither the wish nor the means to verify. But when passing on these communications, it did frequently remind both sides of the principles and provisions of the Geneva and Hague Conventions, and offered its interpretation of how the law should apply to the case in point.

Nor did it fail to explain its policy on dealing with alleged violations, as for example in the dispute between Britain and Germany over the ship Ophelia:

We took this opportunity of stating, once again, that our Committee was unable to verify the facts – mostly contradictory – presented by the opposing parties, and that we had to content ourselves with asserting the principles, and with giving the interpretation that appears to us to be both legally and historically correct, of the provisions of the Geneva Convention, on the basis of the facts as presented. But at the same time we insisted strongly on our independence, and reserved our right to say categorically and impartially that a certain occurrence or fact or procedure seemed to us to be contrary to the intention of the international legislators and to the letter or spirit of the international agreements of 1906 and 1907; and this we would do irrespective of whether our opinion upheld one side or the other in the argument.

The ICRC gave three reasons justifying its procedure in passing on complaints, and explaining its aims in doing so:

a) The complaints were a reminder in themselves of the existence of treaty rules and of the desire of governments to abide by them and to claim the benefit of them.
b) The transmission of protests gave the accused belligerent an opportunity of providing an explanation, of refuting the complaint or of apologizing.

c) An internal enquiry among subordinates would serve as a reminder of the international rules in force and would draw the attention of the troops to the need to comply with them.\textsuperscript{134}

For all this, the International Committee was forced to admit that the enquiries were not always carried out as thoroughly and in such good faith as might be hoped. In some cases governments found that the simplest response was to make counter-accusations, rather than hold enquiries whose results could have been damaging; at other times complaints were shelved and forgotten, despite reminders from the ICRC.\textsuperscript{135}

Yet there was a far more serious obstacle than the negligence of civil servants. In order to uncover misconduct by members of the armed forces, the procedure presupposed a determination on the part of the higher authorities to ensure that the legal provisions were respected. But if the government itself decided, deliberately, to break the rules, it would be a waste of time passing on complaints from the adverse party and demanding an enquiry.

The ICRC spoke out several times about such cases. It is clear that the line between appealing for respect for the law and publicly denouncing a violation can be tenuous; the same can be said for the distinction between interpreting the law and condemning its non-respect. However, even if one were to adopt the narrowest interpretation, there were at least four public statements in which the ICRC’s undoubted intention was to protest over violations of the Conventions:\textsuperscript{136}

- the appeal of 12 July 1916 to belligerents and neutral countries concerning retaliatory measures against prisoners;\textsuperscript{137}
- the note of 14 April 1917 to the German government concerning the torpedoing of hospital ships;\textsuperscript{138}
- the appeal of 21 January 1918 addressed to the belligerents and calling for the closure of so-called propaganda camps;\textsuperscript{139}
- the appeal of 6 February 1918 condemning the use of poisonous gases.\textsuperscript{140}

By considering what these issues have in common, it will be possible to see what prompted the ICRC to intervene, and hence the doctrine that determined its response. Three factors stand out:

a) The facts were irrefutable.
b) The cases in question were the result of open and deliberate government policy.
c) This policy did not bring about simply a violation of a particular provision of the Hague and Geneva Conventions: it cast the state’s willingness to abide by the law in doubt, thereby threatening the whole treaty structure of protection.

The governments’ responses varied from warm approval to condemnation, according to whether or not the respective capitals considered themselves
implicated. Governments that objected questioned the wisdom of the ICRC’s action or the validity of the protest – but as far as one can see, none of the governments concerned questioned the Committee’s authority to make the protests.¹⁴¹

But how effective were they? They certainly did not put a stop to reprisals against prisoners of war, or the torpedoing of hospital ships, or the existence of propaganda camps, much less the use of poison gas. The ICRC had no illusions about the practical effects of its interventions.

Yet the results were not all negative: the French government replied to the appeal of 12 July 1916 by proposing that all planned reprisal measures be notified to the Protecting Power, allowing for a time lapse of four weeks during which the belligerents might be able to come to terms and thereby avert implementation of the announced measures.¹⁴² Negotiations followed, before the proposal was adopted in the agreements of 1917 and 1918.¹⁴³ Thanks to the support of the Spanish government it was also possible to reach an agreement protecting hospital ships flying the French flag.¹⁴⁴

The ICRC’s practice regarding violations of the Geneva and Hague Conventions may, then, be defined: as a general rule the Committee restricted itself to passing on the complaints it received without commenting on the alleged facts, but with a reminder of the law applicable in the circumstances. It took a stance only when it was confronted with an incontrovertible and grave situation resulting from a deliberate act by a government which was likely to jeopardize the entire system of protection afforded by the Conventions.

9. Conclusions

The International Committee came out of the First World War transformed; through force of circumstances it had laid the basis of an unprecedented operational framework which would alter very little in later conflicts. The Agency had been able to watch over the fate of millions of prisoners, and by its tireless efforts and highly organized working methods it had managed to restore contact between prisoners and their families. The ICRC had sent its delegates to visit camps of prisoners of war and civilian internees in practically every warring country, and had set up relief operations for prisoners and the civilian population. Where its own resources had been inadequate it had succeeded in co-ordinating the work of others to instigate joint operations. It had played a decisive role in the repatriation of hundreds of thousands of prisoners.

The Committee had also been involved in important negotiations; throughout the war it had deployed discreet but continuous diplomatic efforts to try to improve the prisoners’ conditions. It had not hesitated to make its voice heard, either to offer its own interpretation of the law or to protest against violations of the Geneva and Hague Conventions.
Its field of work had expanded considerably. Until 1914 the ICRC had concentrated on wounded and sick soldiers and on members of the medical corps; but during the First World War it became equally active on behalf of prisoners of war and the civilian victims of conflict such as internees, hostages and deportees. It went even further, by speaking out on the methods and means of warfare used by the opposing sides.

The transformation was indeed a radical one, affecting virtually every area of its work. In retrospect it can be said that no other period has been as important for the ICRC’s development.

But how was this forced evolution to have a bearing on its future development? There appear to be two factors which were to have significant consequences for the future of the Committee and for humanitarian law.

The first is that the involvement of neutral institutions – the Protecting Powers, the ICRC, the National Societies of neutral countries – proved to be essential in ensuring the application of the Geneva and Hague Conventions. Without this involvement the whole edifice of treaty rules would probably have crumbled in the first few months of the war under the onslaught of the reprisals and counter-reprisals adopted by the belligerents. Subsequently the ‘neutrals’ exercised a modicum of supervision over the prisoner’s conditions – without which the treaty commitment could not be maintained. In formally acknowledging this supervision, the agreements concluded between the belligerents in 1917 and 1918 did no more than confirm a situation that had existed de facto since 1915. It was an inescapable fact that it would henceforth be impossible to try to establish a treaty-based system of protection unless the parties accepted at least a minimum of external supervision.

The second point is that the International Committee became a vital component in the machinery for protecting prisoners. It did not seek a predominant position for itself in this; where possible, it passed on to other intermediaries those tasks for which it felt its own involvement was not indispensable. Nonetheless, its complete independence guaranteed it exceptional freedom of action, allowing it to take a wide variety of initiatives and maintain relations with any authority, recognized or not, which was holding prisoners of war.

In many cases these initiatives were crucial. In forwarding lists of prisoners, mail and relief supplies and in carrying out visits to prison camps, the ICRC performed pioneering work, opening doors for itself and others. In the repatriation of prisoners it sought to create common ground between governments which did not recognize one another and which refused to communicate directly. Overall these efforts were applauded and earned the ICRC immense respect and authority.

At the end of the day it was the circumstances themselves which showed the need for an organization that was totally independent of the parties to the conflict and that had no interest other than securing humanitarian protection for the victims of war. This was precisely the role the ICRC sought to play...
during the conflict and which it would continue to play thereafter; and it was fully aware of this:

The present war has shown the need for an organization, working outside governments and National Red Cross Societies, with the task of upholding the international conventions and protecting the principles of humanity.

The International Committee has sought to accomplish this mission. To do so it established an information service for prisoners of war; it took steps to bring about the repatriation of prisoners, both the invalid and the able-bodied; during the war it made appeals and protests whenever it felt that circumstances so required. In doing all this, it always acted on its own initiative and responsibility.

Consequently, as the National Red Cross Societies become more closely enmeshed in the official structures, set in motion and directed by their governments, the Committee, for its part, must avoid being subject to official or political influence if it wishes to develop and accomplish useful work. It can remain impartial only insofar as it remains free of any binding ties. Its only power lies in its absolute and jealously-guarded independence.145

Notes


4 The 1906 Geneva Convention and the Hague Conventions IV and X were all marred by the general participation clause (‘clausula si omnes’) under which each of the treaties was applicable only on condition that all belligerents were party to it; it needed only one of them to renounce it to free the others from their obligations (Art. 24 of the 1906 Geneva Convention; Art. 2 of Hague Convention IV of 1907; Art. 18 of Hague Convention X of 1907).

The European belligerents, as well as the United States and Japan, had all ratified the above instruments, either in their definitive state or in an earlier version (Geneva Convention of 22 August 1864, Hague Conventions II and III of 29 July 1899); on the other hand, Liberia, Costa Rica and Honduras, which entered the war after the United States, were not party to the Conventions. Even though these latecomers took no effective part in the hostilities, the other signatories could – had they made a literal interpretation of the treaties – have considered themselves freed from their obligations. In the event, they did not; only the United States said it considered that the Geneva Convention was no longer applicable, but it was careful to wait until the end of the war before clarifying its position (letter from the United States Legation at Berne to the ICRC, 9 December 1918, *Revue internationale de la Croix-Rouge* (RICR), no. 1, January 1919, p. 51; *Papers relating to the Foreign Relations of the United States*, 1918, Supplement 2, *The World War*, United States Government Printing Office, Washington, 1933, pp. 50–1).
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The essential point is this: throughout the war, the belligerents considered the Geneva and Hague Conventions as legally applicable and thus as governing their reciprocal relations. They certainly never failed to invoke the law on their own behalf whenever an opponent violated it.


Regulations respecting the Laws and Customs of War on Land, Annex to Hague Convention IV of 18 October 1907.

As Professor Virally rightly remarks: ‘… a complex legal regime can not normally be defined at a single stroke, especially when it has to be applied to a diverse series of individual situations. There has, therefore, to be a gradual progression towards realization. The term ‘principles’ is useful for denoting the most general and abstract norms from which this progression starts and for defining the general framework in which it will develop. It also makes us understand that, reduced to the ‘principles’, a legal regime is incomplete and therefore can not be applied to those situations it is meant to govern [...] principles, in this sense, signify legal rules that are not self-executing’ [ICRC translation]. Michel Virally, ‘Le rôle des principes dans le développement du droit international’, in En hommage à Paul Guggenheim, Faculty of Law of the University of Geneva and Graduate Institute of International Studies, Geneva, 1968, pp. 531–54 esp. p. 533.

Newièvre Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu, the American Red Cross, Washington, 1912, p. 318; Chapter IV, section 5 above, pp. 71–6.


Ibid., pp. 132–4.

Bulletin international, no. 180, October 1914, pp. 251–2; Durand, From Sarajevo to Hiroshima, pp. 29–31.


A Protecting Power is a neutral state which a belligerent nation has asked to look after its interests, and those of its nationals, on the territory of an enemy. In the Autumn of 1914 the United States represented British interests in Germany and in the Austro-Hungarian Empire, and vice-versa; Spain looked after French interests in the Central Powers. After the United States entered the war in the spring of 1917, Switzerland took over all the protection mandates held until then by Washington. The role of the Protecting Power in international humanitarian law is discussed in Book II, Part 7, of this study.

20 Geneva Convention relative to the Treatment of Prisoners of War, of 27 July 1929, Art. 77; Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, Art. 122.
22 Ibid., pp. 48–51.
26 Rapport général, pp. 43 and 51.
27 Ibid., pp. 52–3.
28 In the alphabetical-phonetical index, all the cards referring to surnames pronounced in the same way were kept together, regardless of any differences in spelling, and filed in the alphabetical order of the first names. Thus, Schmidt, Schmied, Schmit, Schmitt, Smith, etc., were classified as being the same surname. Rapport général, p. 56. Further details in Djurovic, The Central Tracing Agency of the International Committee of the Red Cross, Henry Durant Institute, Geneva, 1986, pp. 44–6.
29 Rapport général, p. 43; Durand, From Sarajevo to Hiroshima, pp. 36–8.
31 Ibid., p. 58.
32 Bulletin international, no. 188, October 1916, pp. 407–8; Rapport général, pp. 43 and 58–62; Durand, From Sarajevo to Hiroshima, p. 44.
34 By 31 December 1918, some 1,370,000 items of information had been communicated to prisoners’ families, and about 125,000 people had visited the Agency. These figures do not take account of the first three months of the war, when no statistics were kept. Bulletin international, no. 193, January 1919, p. 83; RICR, no. 1, January 1919, p. 110.
35 Some 4000–5000 letters were sorted, checked and forwarded each day in the autumn of 1914. Rapport général, pp. 65–6.
36 Statistics for POW mail handled by the Swiss postal services were as follows: 497 million letters or cards, 115 million parcels and 10 million money orders worth a total of 148 million Swiss francs. RICR, no. 3, March 1919, pp. 309–13.
37 The Agency forwarded 1,884,914 parcels, as well as money transfers to a value of 21,603,800 Swiss francs. Rapport général, pp. 64–9 and 224.
38 Exception is made of Articles 42 to 56 of the Hague Regulations, concerning military authority over the territory of a hostile state; but after laying down some general principles, these articles provide detailed rulings only on the amount of the levies that might be raised by the occupying army. The Regulations say nothing about the internment of enemy civilians, the taking of hostages and deportation.
41 More than 190,000 replies had been given by 31 December 1918, according to RICR, no. 1, January 1919, p. 110.
42 The Mixed Medical Commissions, composed of doctors of the detaining power and of a neutral state, visited prison camps, examined the wounded and sick, and made lists of prisoners eligible for repatriation or internment in a neutral country.

Ibid., p. 228.

Documents publiés à l’occasion de la guerre (reports by the Committee’s delegates on their visits to prison camps), twenty-four volumes published between March 1915 and January 1920, first series (reports by Mr Naville, Mr van Berchem, Dr de Marval and Mr Eugster on their visits to prison camps in Britain, France and Germany), ICRC, Geneva, March 1915, p. 3; Rapport général, pp. 85–6.

Apart from the minutes of the Committee and the International Prisoners of War Agency, I have also studied the following archival documents: 1914–18 war, general file; files 418/I, 418/II, 418/IX, 431/IIa, 431/IIb, 431/IIic, 431/V, 431/VII, 432/II, 432/I, 434/II, 444/III, 471/I, 472/X. The minutes are disappointingly terse, while the archival records for the period are incomplete, particularly concerning the first months of the war.

Bulletin international, no. 180, October 1914, pp. 251–2; Durand, From Sarajevo to Hiroshima, pp. 66–70.


Documents publiés à l’occasion de la guerre, first series, p. 3.

Rapport général, p. 86.


Minutes of the International Committee (Prisoners of War Agency), vol. 7, 18 December 1914.

See Le Rôle et l’Action du Comité international de la Croix-Rouge pendant la Guerre européenne de 1914 à 1916, p. 31.


‘The International Committee left relief operations to others, but it kept the delegations …’, wrote the ICRC in Le Rôle et l’Action du Comité international de la Croix-Rouge pendant la Guerre européenne, p. 31. However, under the Washington resolution, the distribution of relief was the very raison d’être of the delegations!

See, for example, the Rapport général, p. 85.


According to figures given to Gustave Ador during his mission to Berlin, by December 1914 there were more than 600,000 prisoners of war in Germany alone, Minutes of the International Committee (Prisoners-of-War Agency), vol. 7, 19 December 1914.

‘A fearsome power has appeared, an omnipresent and inflexible Sovereign Lord, dominating the relations between States, strangling initiatives, suspending the application of legal and regulatory provisions, paralysing all progress and improvement: its name is Reciprocity …’, declared the editor of the Bulletin international, with unusual pomposity. ‘There is not one State which will agree to carry out what its signature in fact obliges it to do, without first being assured of Reciprocity. And this attitude has become so widespread […] that one is tempted to ask whether all the humanitarian treaties are but an illusion, and whether this implacable Reciprocity is in fact, at least in war time, the only principle that governments will uphold …’. Bulletin international, no. 181, January 1915, pp. 31–2. The atmosphere was actually so poisoned by insistence on reciprocity and by retaliatory measures that the ICRC threatened to lay down the mandate it had received from the Ninth International Conference of the Red Cross. Telegram of 21 September 1914, ICRC Archives, file 418/IX/A.

Rapport général, p. 85.
Renseignements complémentaires sur l’activité de l’Agence internationale des Prisonniers de Guerre à Genève en 1915 et en 1916, ICRC, Geneva, March 1916, p. 37 (emphasis added). Similarly, see the 166th Circular to Central Committees, 17 February 1916, Bulletin international, no. 186, April 1916, p. 151, and the Minutes of the International Committee (Prisoners-of-War Agency), vol. 7, 9–14 August 1915. The objective of using firsthand reports by ICRC delegates to prevent additional retaliatory measures against prisoners of war is reflected in a handwritten letter sent by Dr de Marval from Paris to Gustave Ador on 8 January 1915, ICRC Archives, file 432/II/2/G. At about the same time, parallel approaches were also being made by the Protecting Powers designated by the belligerents to look after their interests and safeguard their nationals in enemy hands (Spain was representing French and Russian interests, the United States those of Britain, Germany and the Austro-Hungarian Empire). The idea of preventing reprisals by informing governments in detail of the conditions in which their nationals were being held by the enemy is clearly reflected in US diplomatic documents – see Papers relating to the Foreign Relations of the United States, 1915, Supplement, The World War, United States Government Printing Office, Washington, 1928, p. 999.


Protocol of the Copenhagen conference, 15 October to 2 November 1917 (meeting of representatives of the Austro-Hungarian, German, Ottoman, Romanian and Russian governments and National Societies, under the auspices of the Swedish and Danish Red Cross Societies), Art. VIII, Bulletin international, no. 193, January 1918, pp. 122–4; Franco-German agreement signed in Berne on 15 March 1918, Art. 51, Bulletin international, no. 194, April 1918, p. 277; Franco-German agreement signed in Berne on 26 April 1918, Article 23, Bulletin international, no. 195, July 1918, p. 400.

Documents publiés à l’occasion de la guerre (reports by ICRC delegates on their visits to prison camps), 24 volumes, ICRC, Geneva, March 1915 to January 1920.

See, for example, Documents publiés à l’occasion de la guerre, second series, pp. 79–80; seventh series, passim.

Documents publiés à l’occasion de la guerre, first series, pp. 12–15, 25–6, 27 and 46; second series, p. 34; third series, pp. 26, 46 and 50; seventh series, pp. 5–9; ninth series, p. 6; regarding difficulties encountered during visits to Russian prisoners in Germany, see eleventh series, p. 5.

Bulletin international, no. 188, October 1916, p. 408; similarly, no. 194, April 1918, p. 216.

Documents publiés à l’occasion de la guerre, first series, pp. 49–50 and 89–91; third series, pp. 49, 52 and 53; fifth series, pp. 18–19; seventh series, pp. 61–3 and 91; tenth series, pp. 13–14, 53 and 60; twelfth series, pp. 27, 28 and 53; sixteenth series, pp. 46–67.

Rapport général, pp. 86–90.

Ibid., p. 87. This figure, which appears in all the ICRC’s official documents, covers visits for which reports were published. A study of archive material leads to the conclusion that the actual number of visits was far higher; but the records are too fragmentary to allow the precise figure to be established.

Rapport général, pp. 88–90.

Bulletin international, no. 195, July 1918, p. 348. The ICRC in fact often asked that this or that group of prisoners be allowed a visit by representatives of the Protecting Powers or by its own delegates – see Bulletin international, no. 191, July 1917, p. 287; no. 192, October 1917, p. 403; no. 194, April 1918, p. 216; Documents publiés à l’occasion de la guerre, twenty-third series, p. 128.


Le Rôle et l’Action du Comité international de la Croix-Rouge pendant la Guerre européenne de 1914 à 1916, p. 31; Rapport général, p. 85.

Minutes of the International Committee (Prisoners-of-War Agency), vol. 7, 22 January 1915, 12 May 1915, 21 August 1915, etc.
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80 Rapport général, pp. 90–1; Bulletin international, no. 193, January 1918, pp. 69–71; no. 194, April 1918, p. 227; see also Art. 51 of the Franco-German agreement of 15 March 1918, Bulletin international, no. 194, April 1918, p. 277.

81 Neuvième Conférence internationale de la Croix-Rouge, tenue à Washington du 7 au 17 mai 1912, Compte rendu, p. 318. See also above, pp. 74–5.


83 It intervened only in cases where, for example, the recipient’s address was not known, or when the parcel could not be delivered at the address shown. In all, the Agency dealt with the dispatch of some 1,800,000 individual parcels. Rapport général, p. 67.


85 More than 1800 wagon-loads of collective relief supplies were forwarded by the ICRC. RICR, no. 11, November 1919, pp. 1370–2. The League was founded after the war as a federation of National Red Cross Societies, on the initiative of Henry Davison, Chairman of the War Council of the American Red Cross; its aim was to promote co-operation between member societies and foster Red Cross activities in peace-time, particularly in the fields of public health and relief following natural disasters. The National Societies of the defeated countries – Germany, Austria, Hungary, Bulgaria and Turkey – were excluded from the League until 1922. In 1983 the organization changed its name to League of Red Cross and Red Crescent Societies and in 1991 to International Federation of Red Cross and Red Crescent Societies.


87 RICR, no. 4, April 1919, pp. 465–9.

88 RICR, no. 4, April 1919, p. 471; no. 5, May 1919, p. 585; no. 6, June 1919, pp. 702–3; no. 7, July 1919, 869–70; no. 8, August 1919, p. 1002; no. 11, November 1919, pp. 1348–50; no. 12, December 1919, pp. 1489–93 and 1521–2; no. 14, February 1920, pp. 198–205; no. 16, April 1920, pp. 405–11; no. 17, May 1920, pp. 610–11; no. 20, August 1920, pp. 937–41; no. 23, November 1920, pp. 1360; no. 27, March 1921, pp. 263–5; no. 36, December 1921, pp. 1197–232 (report by Dr Montandon); Durand, From Sarajevo to Hiroshima, pp. 117–23.

89 ICRC appeal to the Peace Conference, 10 March 1919, RICR, no. 4, April 1919, pp. 465–9.


91 Bulletin international, no. 190, pp. 142–4; Actes du Comité international, pp. 45–6.


95 Armistice with Bulgaria, 29 September 1918, Art. 6; armistice with the Ottoman Empire, 30 October 1918, Art. 4; armistice with Austria-Hungary, 3 November 1918, Art. 7; armistice with Germany, 11 November 1918, Art. 10, de Martens, Nouveau Recueil général de Traité, third series, vol. XI, pp. 126, 159, 163 and 174.


97 Art. 6 of the armistice with Bulgaria; Art. 22 of the armistice with the Ottoman Empire; Art. 10 of the armistice with Germany; the question of the repatriation of Austro-Hungarian prisoners was not dealt with in the armistice agreement of 3 November 1918, de Martens, Nouveau Recueil général de Traités, third series, vol. XI, pp. 126, 160 and 174. Even the repatriation of the severely wounded was suspended by the annulment of all agreements concluded to this effect between the belligerents during the war; see, for example, Art. 10 of the armistice agreement with Germany. De Martens, Nouveau Recueil général de Traités, p. 174.

98 The Treaty of Versailles came into force on 10 January 1920.

99 RICR, no. 9, September 1919, pp. 1108–9.
100 Note from the Secretary-General of the Peace Conference to the ICRC, 2 September 1919, RICR, no. 9, September 1919, pp. 1111–12.

101 RICR, no. 11, November 1919, pp. 1323–34.

102 Note from the ICRC to the Chairman and members of the Allied Supreme Council, 18 October 1919, RICR, no. 11, November 1919, pp. 1348–50.

103 Note of 25 October 1919 from the Secretary-General of the Peace Conference to the ICRC, RICR, no. 11, November 1919, p. 1351.


107 Nevertheless, some Russian prisoners were sent back to areas controlled by the White Russian armies – about 58,000, according to RICR, no. 29, May 1921, p. 494.


111 Rapport général, p. 117.

112 RICR, no. 11, November 1919, pp. 1348–50.

113 Note from the Secretary-General of the Peace Conference to the ICRC, 25 October 1919, RICR, no. 11, November 1919, p. 1350.

114 Note from the ICRC to the Allied Special Commission, 22 November 1919, RICR, no. 12, December 1919, pp. 1516–18.

115 193rd Circular to Central Committees, 8 April 1920, RICR, no. 16, April 1920, pp. 405–9, in particular p. 407.


118 RICR, no. 18, June 1920, pp. 721–2; no. 19, July 1920, pp. 838–40.


120 RICR, no. 16, April 1920, pp. 372–81 and 418–21; no. 20, August 1920, pp. 967–9; no. 26, February 1921, pp. 156–8.

121 RICR, no. 16, April 1920, pp. 372–81 and 418–21; no. 17, May 1920, pp. 609–10; no. 23, November 1920, pp. 1189–99; Agreement between Germany and the Russian Socialist Federal Soviet Republic with regard to the mutual repatriation of prisoners of war and interned civilians, signed at Berlin on 19 April 1920, Article 9, League of Nations, Treaty Series, vol. 2, pp. 64–9; Agreement between Germany and Latvia concerning the exchange of their respective prisoners, signed at Berlin on 20 April 1920, Article 7, ibid., vol. 2, pp. 72–7; Renée-Marguerite Frick-Cramer, Repatriation of prisoners of war from the Eastern front after the war of 1914–1918, ICRC, Geneva, 1944, p. 15.


123 RICR, no. 18, June 1920, pp. 725–8; Agreement between Germany and Hungary with regard to the through transport of their respective prisoners of war, signed at Berlin on 8 May 1920, Article 2, League of Nations Treaty Series, vol. 2, pp. 80–3.

124 Rapport général du Comité international de la Croix-Rouge sur son activité de 1921 à 1923, p. 132.

125 Documents publiés à l’occasion de la guerre, third series, June 1915, pp. 26–56.
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129 The ICRC was only too aware of its limitations in this respect, as shown by a comment in the Bulletin international on the Anglo-German agreement signed at The Hague on 2 July 1917:

It is obvious that direct negotiations between governments, which result in agreements and practical measures, are the most efficient way of improving the conditions of prisoners; they are worth far more than the statements and representations of neutral States or unofficial bodies, which have no power of enforcement. Bulletin international, no. 192, October 1917, p. 397.

130 The ICRC published the replies it received to its statements: regarding the note of 7 December 1914, see Bulletin international, no. 182, April 1915, pp. 144–6; no. 183, July 1915, pp. 314–19; no. 184, October 1915, pp. 469–71. Regarding the Circular of 15 November 1915, see Bulletin international, no. 182, April 1915, pp. 203–8, 225–6 and 253–4; no. 183, July 1915, pp. 401–2.


132 These exchanges were regularly published in the Bulletin international des Sociétés de la Croix-Rouge and later in the Revue internationale de la Croix-Rouge.

133 Bulletin international, no. 186, April 1916, p. 172; similarly, see Bulletin international, no. 183, July 1915, p. 309; no. 191, July 1917, pp. 266–7. The Ophelia was commissioned by the German navy as a hospital ship; she was captured on 18 October 1914 and condemned by the British prize court for having, in addition to her medical installations, the communications equipment and codes of a signalling ship used for military purposes.

135 Bulletin international, no. 194, April 1918, pp. 197–8.
136 This leaves aside the protest over the dismissal of the Central Committee of the Belgian Red Cross (164th Circular to Central Committees, 8 May 1915); the protest was against the infringement of Red Cross principles and the threat to the movement’s integrity, rather than over a violation of legal provisions. Bulletin international, no. 183, July 1915, pp. 275–95; Actes du Comité international, pp. 25–7.

138 Bulletin international, no. 190, April 1917, pp. 140–2; Actes du Comité international, pp. 43–4.
140 Bulletin international, no. 194, April 1918, pp. 185–92; Actes du Comité international, pp. 73–8; Durand, From Sarajevo to Hiroshima, pp. 89–96.
141 See, for example, the letter of 17 August 1917 from the German Legation in Berne in reply to the ICRC’s note of 14 April, Bulletin international, no. 192, October 1917, pp. 384–6.
142 Bulletin international, no. 188, October 1916, p. 405; Durand, From Sarajevo to Hiroshima, pp. 80–2.
143 Anglo-German agreement signed in The Hague on 2 July 1917, Chapter 9, Article 20, Bulletin international, no. 192, October 1917, p. 445; Protocol of the Copenhagen Conference, 2 November 1917 (Germany, Austria-Hungary, Romania, Russia, Turkey), Chapter 14, Article 9, Bulletin international, no. 193, January 1918, p. 133; Franco-German agreement signed in Berne on 26 April 1918, Article 42, Bulletin international, no. 195, July 1918, pp. 411–12; Article 21 of the Anglo-Turkish agreement signed in Berne on 28 December 1917 allowed for a time lapse of eight weeks, Bulletin international, no. 195, July 1918, p. 435; Article 182 of the agreement between Germany and the United States signed in Berne on 11 November 1918 allowed a time lapse of 40 days, American Journal of International Law, vol. 13, 1919, Supplement, p. 52.
References

CHAPTER VI

THE ICRC AND THE DEVELOPMENT OF HUMANITARIAN LAW (1919–39)

Those who cannot remember the past are condemned to repeat it.
George Santayana, The Life of Reason

1. Introduction

Death and destruction are not the only legacies of a long conflict. The Great War left the old structure of humanitarian law just as ruined as the towns and countryside of Europe where the world’s largest armies had fought one another for four years. The Hague Conventions, in particular, had shown their weaknesses, crumbling under the weight of repeated violations and the recourse to reprisals; their lack of detail and the absence of any kind of supervision and punitive measures made most of their provisions ineffective.

To overcome this difficulty, the belligerents had concluded detailed bilateral agreements on the treatment of prisoners of war and the repatriation of the wounded and sick – but these accords were cancelled by the winning side when the Armistice was signed.¹ The old edifice of humanitarian law suffered, in effect, a double blow.

The war had also thrust countless civilians into captivity. Internees, hostages and deportees had suffered in different ways, but they had all cruelly felt the same lack of legal protection against arbitrary acts by their captors.

The Geneva Convention had, overall, successfully passed the test of four years of war, but although recriminations over the treatment of the wounded and medical personnel had been provoked by breaches of the Convention rather than any inherent imperfections in the text, it needed revising to take account of the experience gained during the war.

Taking stock, the International Committee set itself three major objectives:

- the revision of the Geneva Convention;
- the drafting of a convention protecting prisoners of war;
- the drafting of a convention protecting civilians in the hands of an enemy.

All three were urgently needed, and the Committee worked on them simultaneously over a period of several years. For the sake of clarity the three projects will, however, be examined separately.
The Committee’s efforts to develop humanitarian law were not, however, confined to them alone. The return to peace had not stopped the arms race; on the contrary, scientific and technical progress was producing ever more terrifying weapons which posed an acute threat to the civilian population.

Once again the Committee had to attempt to revitalize and expand the law applicable to the conduct of hostilities. This work, which continued from the time of the Rethondes Armistice to the outbreak of the Second World War, had the following aims:

- the prohibition of chemical and bacteriological warfare;
- the setting of limits to bombardment by creating hospital and safety zones and localities;
- the protection of medical aircraft;

These latter projects are not of direct relevance for this study. In any case, although the ICRC’s efforts towards the prohibition of chemical warfare did help to bring about the adoption, under the auspices of the League of Nations, of the 1925 Geneva Protocol, they did not otherwise lead to any formal conventions. There is no need, therefore, to dwell on them here.

2. The revision of the Geneva Convention

Almost immediately after the end of the First World War the ICRC turned its attention to preparing a revised version of the 1906 Geneva Convention. The question was placed on the agenda of the Tenth International Conference of the Red Cross, held in Geneva in 1921, and of the Eleventh Conference in 1923, likewise meeting in Geneva. The draft Convention adopted by the latter was forwarded to the Swiss government, which convened a Diplomatic Conference in July 1929 to revise the Geneva Convention and to draw up a new convention to protect prisoners of war.

This was not intended as a condemnation of the 1906 Convention:

The 1906 Convention was a remarkable achievement ... It had to be handled with care, and there was no question of changing integral parts of it or trying to add new ones unless some undoubted progress was to come of it, for the benefit of war victims – and then only on condition that the harmony and judicious balance of the whole would not suffer.

The 1906 Geneva Convention had certainly proved its worth, and all that was needed was to delete certain clauses which had turned out to be impracticable, and to clarify provisions which had been difficult to interpret. There was no intention of changing its overall structure.
However, one major addition does merit discussion: Article 30, which allowed for an international enquiry into violations.

The 1906 Convention had obliged its signatories to pass laws enabling them to prosecute and punish individuals responsible for violations. On the other hand, it said nothing about ways of dealing with complaints from one party to a conflict about the conduct of another. Two proposals were made to the 1929 Conference to bridge this gap: one was to create an international tribunal empowered to punish violations of the Convention; the other was to set up mixed commissions, composed of representatives of the belligerents and of neutral countries. After long discussions, the Conference turned down both proposals in favour of a provision which, while obliging the adverse parties to hold an enquiry, left the choice of procedure up to them. The result was Article 30:

On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.

Observers at the time saw this provision as ‘a considerable innovation, a real achievement, towards the strict and honest application of the Convention.’ Sadly, these hopes were to be dashed.

The implications of Article 30 for the International Committee cannot, however, be ignored. The ICRC had often received complaints from the belligerents, even though under previous conventions it had no power to do anything about them; in the existing legal vacuum, the Committee had tried to establish procedures which enabled the complaints to be dealt with, but in most cases without finding a satisfactory solution. The 1929 Convention, on the other hand, obliged the parties to the conflict to hold an enquiry and to decide for themselves the best way of doing so. This had the effect of under-scoring the belligerents’ exclusive responsibility and relieved the ICRC of having to deal with the question.

To prosecute violations was one thing – to establish permanent supervision was another, and it may well seem surprising that the 1929 Convention said nothing about it – particularly with regard to the treatment of wounded enemy soldiers – when the recent World War had shown how necessary such supervision was. But in fact, this omission was more apparent than real, for Article 2 of the revised Convention specified that

Except as regards the [medical] treatment to be provided for them ... the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

The Geneva Convention thus drew support from the new Convention relative to the Treatment of Prisoners of War which will be discussed in the following pages.
3. **The Prisoners-of-War Code**

The war had shown the need to ensure the protection of prisoners by means of specific, detailed rules. For that purpose, the Tenth International Conference of the Red Cross adopted a resolution calling on governments to conclude a diplomatic agreement as soon as possible on prisoners of war, deportees, evacuees and refugees, specifying their legal status and laying down rules governing their treatment. The Conference also formulated a set of general principles to serve as the basis for the proposed new Convention, for which it asked the ICRC to prepare a preliminary draft.

Taking the Hague Regulations and the agreements concluded between belligerents during the First World War as a starting point, the Committee produced a very detailed draft which was approved by the Eleventh International Conference. The draft dealt only with captured soldiers and civilians liable to be called up in the event of war.

The ICRC’s text was submitted to the Diplomatic Conference which met in Geneva in July 1929; it adopted a convention of 97 articles which, while less precise than the ICRC’s draft, nonetheless marked an important step forward. After stating general principles – first and foremost the prohibition of reprisals against prisoners of war – the convention dealt with the capture and evacuation of prisoners, organization of prison camps, food, clothing, hygiene, working conditions, penal and disciplinary sanctions, relief and information bureaux, repatriation and supervision.

Two points will be examined more closely here.

**a) The information bureaux**

The ICRC’s draft code provided for the establishment of national information bureaux for prisoners of war, on the lines of those mentioned in Article 14 of the Hague Regulations of 1907; the document also called for the creation of a central information agency:

The International Committee of the Red Cross is authorized, if it deems necessary, to open a central information and relief agency for prisoners of war, in a neutral country. The International Committee may, as it sees fit, delegate the task of organizing this agency to a Red Cross Society of a neutral country closer to the theatre of hostilities, to work under the Committee’s supervision.

The agency will be responsible for centralizing all official and unofficial information about the places of detention of prisoners of war, their state of health, their conditions of detention and their needs, and to communicate these as quickly as possible to the prisoners’ own country, to the National Red Cross Society of that country and to the families concerned.

The belligerents shall grant this agency their official support as well as every facility needed for it to carry out its work ...

The draft article, therefore, set out to codify for future use the practice which the ICRC had adopted during the First World War.
At the Diplomatic Conference several delegations considered that this article gave the ICRC something approaching a monopoly and thus went too far; they did not wish to restrict the Committee’s freedom of action, but they felt that other means of creating a central agency should not be ruled out, if geographical or practical reasons made this necessary.\textsuperscript{17}

The Conference eventually adopted the following article:

A Central Agency of information regarding prisoners of war shall be established in a neutral country. The International Red Cross Committee [sic] shall, if they consider it necessary, propose to the Powers concerned the organization of such an agency.

This agency shall be charged with the duty of collecting all information regarding prisoners which they may be able to obtain through official or private channels, and the agency shall transmit the information as rapidly as possible to the prisoners’ own country or the Power in whose service they have been.

These provisions shall not be interpreted as restricting the humanitarian work of the International Red Cross Committee.\textsuperscript{18}

The Convention also required the national bureaux to send the central agency all the information they had.\textsuperscript{19} It exempted the information bureaux from postal charges as well as from import duties and transport charges.\textsuperscript{20}

These provisions made it obligatory to open a central information agency in a neutral country and were designed to facilitate the ICRC’s initiatives to that effect. They gave the Committee the freedom to decide whether it should do something itself, but allowed the belligerents the possibility of taking alternative action if they judged it necessary, on condition that they reached agreement on doing so.\textsuperscript{21}

b) The organization of supervision

The First World War had shown that any set of legal rules, however detailed, would remain powerless to ensure the effective protection of prisoners of war unless it provided for some kind of control or supervisory mechanism.

Three articles in the ICRC’s draft dealt with this problem. They proposed that the signatory states should give the ICRC the job of appointing itinerant commissions, made up of citizens of neutral states and responsible for seeing that the Convention was applied properly. The commission members would be allowed to visit any place where prisoners of war were being held, to have access to all premises occupied by the prisoners and to speak to them in private. The commissions’ reports would be sent to the ICRC which would then communicate them to the belligerents as well as publish them; the belligerents themselves would undertake to put right as quickly as possible any problems brought to their attention.\textsuperscript{22}

These proposals gave the ICRC a dominant role in terms of supervision: it would appoint the itinerant commissions, receive their reports and send them to the adverse parties; the reports would be binding on the belligerents as
they would have promised in advance to abide by their conclusions. Thus, the Committee would become the kingpin of the control mechanism it was proposing.

But the said proposals also vested the entire responsibility for supervising conditions of detention in the ICRC alone; they excluded the Protecting Powers from the vital area of visits to places of detention, even though the draft convention did confer certain duties on these Powers, such as the reception of complaints from the prisoners, relations with the prisoners’ representatives and the monitoring of legal proceedings.

Had the Committee this time really gone too far, guided perhaps by an inflated sense of its own importance? Had it, through ignorance, underestimated the role of the Protecting Powers during the war and misjudged the safeguards from which, thanks to their intervention, the prisoners had benefited? Or had it felt that, in a new war, the diplomats of neutral states would be so overworked that they would no longer be able to carry out regular visits to camps?

Documents of the period suggest another motive: the ICRC felt that neutral delegates would enjoy far greater authority and achieve better results than had been the case in the previous war if the same people were responsible for supervision on both sides: centralization in the field of visits to prisoners seemed to guarantee greater efficiency, much as it did for the exchange of information. All the same, the ICRC may have overestimated its own strengths and failed to recognize an important source of help, namely the Protecting Powers.

In any case, the Diplomatic Conference stood the ICRC’s proposal on its head: after a long debate, it adopted a provision which assigned the major responsibility to the Protecting Powers, as was made clear in Article 86 of the Convention:

The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the protecting Powers charged with the protection of the interests of the belligerents; in this connection the protecting Powers may, apart from their diplomatic personnel, appoint delegates from among their own nationals or the nationals of other neutral Powers. The appointment of these delegates shall be subject to the approval of the belligerent with whom they are to carry out their mission.

The representatives of the protecting Power or their recognized delegates shall be authorized to proceed to any place, without exception, where prisoners of war are interned. They shall have access to all premises occupied by prisoners and may hold conversation with prisoners, as a general rule without witnesses, either personally or through the intermediary of interpreters.

Belligerents shall facilitate as much as possible the task of the representatives or recognized delegates of the protecting Power. The Protecting Powers were also charged with using their good offices to settle any dispute arising over the application of the Convention.
This did not mean, however, that the tables were turned completely and that the ICRC now found itself shut out from the supervisory process: Article 88 of the Convention added the following clarification:

The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee [sic] may perform for the protection of prisoners of war with the consent of the belligerents concerned.29

This provision was of major importance for the ICRC, as it was the first mention, in treaty law, of what may be termed the right of humanitarian initiative.

This is not the place for an in-depth analysis of Article 88, but the following three points may be made:

a) The article covers activities that the ICRC might wish to undertake for the protection of prisoners of war; its right of humanitarian initiative could not be limited to providing assistance. This view is supported by the fact that the activities of relief societies for prisoners are governed by other provisions in the Convention, in particular Article 78.

b) Article 88 comes under Part VIII, Section II of the Convention, entitled Organization of Control.30 It would seem certain, then, that the Diplomatic Conference wished to confirm the ICRC’s authority in supervising the application of the Convention; this contention is upheld by the report submitted to the plenary session of the Conference by Commission II, which had been responsible for drafting the Prisoners-of-War Code:

Article 88 … expressly states that the foregoing provisions, concerning the role of the Protecting Powers, do not constitute any obstacle to the humanitarian work that the International Committee of the Red Cross may perform for the protection of prisoners of war, with the consent of the belligerents concerned.31

c) Finally, the scope of Article 88 is clearly defined by the clause subordinating humanitarian action which the ICRC might take to the consent of the belligerents concerned; the article recognizes the right of the ICRC to propose measures to protect prisoners of war, but it does not oblige the parties to the conflict to accept them.

Conclusion

The Diplomatic Conference of 1929 contributed in two ways to defining the duties and responsibilities of the International Committee:

- by giving it a specific role in the transmission of information on prisoners of war;
- by acknowledging its entitlement to monitor the application of the Convention.

These new terms of reference fell short of what the ICRC had actually done during the Great War, but the decision of the Diplomatic Conference was no
less remarkable for all that: for the first time, the Committee’s duties and responsibilities were recognized in an international treaty.

4. Civilians in the power of an enemy

War is not, therefore [wrote Rousseau], a relationship between man and man, but between State and State, in which individuals become enemies only by accident, not as men, nor even as citizens, but as soldiers; not even as members of their own nation, but as its defenders.

This maxim was utterly disregarded during the Great War. Under the guise of precautionary measures, the belligerents interned most enemy aliens at the outbreak of hostilities. The inhabitants of occupied territories were also to suffer numerous tribulations, such as deportation or internment, or being held hostage.

Once the war was over, was it enough simply to censure these acts of cruelty as reminiscent of a bygone age, or should there be a convention to protect civilians in the hands of an enemy, even though by regulating practices that were widely condemned, the international community might seem to be condoning measures which international law was powerless to prevent?

The International Committee resolutely took the second course. This choice was endorsed by the Tenth International Conference of the Red Cross, which called on governments to adopt, without delay, a diplomatic convention to protect prisoners of war, deportees, evacuees and refugees and requested the ICRC to prepare a preliminary draft.

The Committee set up a special commission for this purpose, which quickly realized that prisoners of war would have to be dealt with separately from civilian internees, as the plight of the latter was part of the overall problem of protecting civilians in wartime. The ICRC therefore submitted two draft conventions to the Eleventh Conference, one concerning prisoners of war, the other civilians in the power of an enemy.

On the questionable pretext that the fate of civilians in enemy hands was a matter for the laws of war and not for the Red Cross, the Eleventh Conference rejected the draft text on civilians and confined itself to voicing what amounted to a pious hope, with no practical impact whatsoever.

So while the draft convention on prisoners of war was forwarded to the Swiss government for submission to a diplomatic conference, the text on civilians was quietly dropped. The ICRC tried in vain to have it re-examined at the Twelfth Conference, which adopted a resolution that was as well-intentioned as it was useless.

So the first attempts to establish international rules for the protection of civilians in the hands of the enemy ended in failure. The ICRC had to decide whether a different approach might offer a better chance of success.

The ICRC’s draft code for prisoners of war included a provision covering civilian prisoners of an age to take up arms; Article 91 stated:
If the belligerents should take measures which partially or wholly restrict the
freedom of civilians of the adverse party who find themselves on their territory at
the start of hostilities and who are liable to be called up, the persons concerned
shall be considered to be prisoners of war and shall be treated as such.41

While this draft article protected only one group of civilians affected by war,
it still would have had considerable impact, since it granted a defined status
to an important category of people. It also aimed to set a kind of ‘minimum
standard’ of treatment, for how could women, children and the elderly be
treated more severely than men eligible for military service?

The 1929 Diplomatic Conference turned down this draft article on the
grounds that the question did not come within the scope of its work;42
instead it included the following recommendation in the Final Act:

The Conference … recommends that an exhaustive study should be made with a
view to the conclusion of an international Convention regarding the condition and
the protection of civilians of enemy nationality in the territory of a belligerent or
in territory occupied by a belligerent.43

Thus, the second attempt to obtain legal safeguards for civilians in enemy
hands also came to nothing.

The International Committee went back to the drawing board, and pre-
pared a draft convention for submission to the Fifteenth International
Conference, to be held in Tokyo in 1934; the text covered enemy aliens on
the territory of a belligerent and the population of a territory occupied by a
belligerent.44

This draft included general principles covering, in particular, permission
to leave enemy territory, as well as the prohibition of reprisals, of deportation
and of the execution of hostages; it granted interned civilians a level of treat-
ment at least equal to that required for prisoners of war; supervisory meas-
ures were modelled on those set forth in the Prisoners-of-War Code.45

The Tokyo Draft, as it came to be called, did not escape criticism; some
provisions, notably those concerning occupied territories, might well appear
over-cautious when set against the experiences of the First World War. But
the document did place limits on the internment of civilian enemy aliens and
on the actions of the occupying power: it banned the most arbitrary and cruel
measures, and was therefore a valuable safeguard for civilian victims of war.
Perhaps its most important aspect was that it lent firm support to the activi-
ties of the Protecting Powers and the ICRC; one provision echoed Article 88
of the Prisoners-of-War Code:

The foregoing provisions do not constitute any obstacle to the humanitarian
work which the International Red Cross Committee [sic] may perform for the
protection of enemy civilians with the consent of the belligerents concerned.46

The Tokyo Conference recognized ‘the great interest attaching to the draft …’, and requested the ICRC to take the necessary steps towards the conclu-
sion of a convention protecting civilians.47
The Committee then transmitted the draft to the Swiss government, which began consulting those capitals most closely concerned. Several governments were reticent. The French, in particular, made clear their ‘firm and definite refusal’, according to Swiss Foreign Minister Giuseppe Motta. In these circumstances Berne felt that the ‘prospects were not promising enough’ for a diplomatic conference to be held with any real chance of success, and gave up the idea.

Despite this setback, the ICRC did not consider the plan irretrievably lost. Following the Sixteenth International Conference, held in London in June 1938, the Committee resumed work on several draft conventions, in particular the Tokyo Draft. This time it contacted the governments of both Switzerland and the Netherlands, for whilst the Tokyo Draft, in seeking to establish a special set of rules to protect certain categories of people from the effects of war, could be viewed on the one hand as an extension to the Geneva Conventions of which the Swiss government was the depositary, in trying to restrict the freedom of the occupying power it could also be seen as a development of the Regulations attached to the Fourth Hague Convention, whose depositary was the Dutch government. After discussions between the two capitals and the ICRC, the Dutch government said, in the spring of 1939, that it was prepared to give Berne a free hand so that ‘the subject might be put before an international conference as soon as possible …’.

The Swiss government engaged in new consultations with a view to calling a diplomatic conference early in 1940. But it was too late. The outbreak of the Second World War prevented the conference from taking place.

And so, apart from the meagre safeguards afforded by Articles 42 to 56 of the Hague Regulations, civilian victims had no legal protection against the cataclysmic events that lay ahead.

The most monstrous crimes against humanity were to take place before the international community finally agreed to adopt a convention protecting the civilian victims of war.

5. Conclusions

On the eve of the Second World War, what had the ICRC managed to achieve in the development of humanitarian law?

There were two new Conventions, signed on 27 July 1929:

- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field;
- the Convention relative to the Treatment of Prisoners of War.

These two agreements were a decisive advance on existing law: the elimination of the general participation clause (clausula si omnes), the prohibition of reprisals, the establishment of sufficiently detailed legal rules and of a control
mechanism all combined to offer wounded and sick soldiers, as well as prisoners of war, a level of protection that matched humanitarian aspirations.

But no such protection was obtained for civilians. The persistent efforts of the International Committee had failed to achieve their desired result. The reluctance of some countries to agree to legal protection for civilians showed only too clearly that they did not want to give up any of their freedom of action in this sphere, regardless of the risk that civilians might once more be subjected to arbitrary treatment while in captivity or under occupation.

There was, therefore, a serious disparity: on the one hand, prisoners of war were protected by a set of detailed legal rules, with many safeguards; on the other, civilians had no legal protection and were at the mercy of the government into whose hands they had fallen. Regardless of its own wishes, the ICRC was subject to the constraints of this situation.

Even though the 1929 Diplomatic Conference had not given the Committee any specific rights of which it could avail itself, it had nonetheless recognized its role in the protection of prisoners of war and mandated the Committee to create a central information agency. Here, the ICRC had a firm foundation for its work, at least when dealing with countries that were party to the Prisoners-of-War Convention.

The situation was quite the reverse when it came to civilians: there was no legal framework to which the Committee could refer, and no document to uphold its authority in this field. Any initiatives that the ICRC might take on behalf of civilians would be totally dependent on the belligerents’ good will—a quality in markedly short supply in relations between a nation at war and its enemies.

The difficulties encountered by the ICRC in its humanitarian activities during the Second World War are only too clearly foreshadowed. But before going on to consider that chapter of the Committee’s history, we shall first look at how its operations developed in the inter-war period.

Notes

1 Armistice between the Allies and Germany signed at Rethondes (Compiègne) on 11 November 1918, Article 10, de Martens, *Nouveau Recueil général de Traité*, third series, vol. XI, p. 174.


5 Des Gouttes, Commentaire, p. 7 [ICRC translation].


7 Actes 1929, p. 670; The Laws of Armed Conflicts, p. 333.

8 Des Gouttes, Commentaire, p. 212.

9 Actes 1929, p. 661; The Laws of Armed Conflicts, p. 326.


12 Eleventh International Conference of the Red Cross, Code des prisonniers de guerre, déportés, évacués et réfugiés, pp. 16–42; Onzième Conférence internationale de la Croix-Rouge, Compte rendu, p. 198 (Resolution III); Commission II of the 1929 Diplomatic Conference took the ICRC draft as the basis for its discussions; the draft is reproduced in Actes 1929, pp. 21–34.

13 This meant civilians who, under current legislation, were liable to be called up for military service immediately or within one year. Dixième Conférence internationale de la Croix-Rouge, Compte rendu, p. 218.


15 Article 86 of the draft, Actes 1929, p. 32.

16 Article 88 of the draft, Actes 1929, p. 32.

17 Actes 1929, p. 509; Procès-verbaux de la Sous-Commission II (administrative et sanitaire) de la Commission II de la Conférence diplomatique de 1929, sessions held on 13, 15 and 20 July 1929, typewritten, ICRC library, 341.33/4D.

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21 *Actes 1929*, p. 636. As far as is known, there is only one example of a central information agency being set up in a neutral country other than at the ICRC’s initiative: that at Montevideo, opened by the Uruguayan government during the Chaco War (1932–5); this agency does not appear to have been very active.
22 Articles 38 and 80, *Actes 1929*, pp. 697 and 709; *The Laws of Armed Conflicts*, pp. 349–50
27 Article 88, *Actes 1929*, p. 711; *The Laws of Armed Conflicts*, p. 359. Article 88 was adopted unopposed by Sub-Commission I (legal and penal) and then by Commission II of the 1929 Diplomatic Conference. It may therefore be assumed that delegates to the conference saw the provision as nothing more than confirmation of the ICRC’s existing right of initiative which had already become part of customary law, most notably during the First World War; see *Procès-verbaux de la Sous-Commission I (juridique et pénale) de la Commission II de la Conférence diplomatique de 1929*, session of 15 July 1929; *Actes 1929*, p. 520.
References

CHAPTER VII


For what can war but endless war still breed?
John Milton

1. Introduction

The church bells which greeted the signing of the Armistice on 11 November 1918 seemed to mark the beginning of a new era in which mankind would be saved forever from the scourge of war. ‘Never again!’ was the fervent cry. It was to be the end not just of this war, but of all wars.

Popular optimism found support in the idealism of President Wilson. The Allies’ victory was seen as a triumph of right over might, in the firm belief that the new world order established within the League of Nations would banish the spectre of the terrible slaughter from which Europe had just emerged exhausted.

How these hopes were to be dashed! The upheaval had been far too great for stability to be restored by the simple stroke of a pen. The old world order had been destroyed beyond repair, while the birth of the new order, based on the Treaty of Versailles, was accompanied by more bloody disruptions: the Russian Civil War, the Spartacist insurrection in Germany, revolution and counter-revolution in Hungary, the wars between Russia and Poland and between Greece and Turkey, and the continuing Franco-German antagonism which culminated in the occupation of the Ruhr.

It was not until 1924 that Europe at last settled down. A few brief years of hope ensued, marked notably by the end of the Soviet Union’s isolation, the easing of tension between France and Germany, the Locarno Treaty and the Briand-Kellogg Pact. These were boom years, the ‘roaring twenties’ during which prosperity and illusion conjured up an impression of enduring peace.

However, peace vanished along with prosperity: the Great Depression triggered by the Wall Street crash in October 1929 ushered in new political crises – the collapse of currency values and of fragile democratic governments unable to deal with hunger and unemployment, and the rise of totalitarian regimes bent on revenge and conquest.

The myth of collective security was shattered at its first test, leaving international relations at the mercy of armed force, ultimatums and faits
accomplished. In an atmosphere of growing tension, the conflict in Ethiopia, the Spanish Civil War and the Sino-Japanese conflict were the precursors of a new global conflict.

The inter-war period appears, then, as a small island of peace between two phases of violence and instability, the first of which was an extension of World War I while the second was already setting the scene for World War II.

* How did the ICRC’s work develop during this troubled interlude, so fraught with conflict, civil war, revolution and counter-revolution?

Obviously, the Committee’s ability to intervene effectively depended on the legal and practical considerations peculiar to each situation it was faced with. These can be grouped in three categories:

- international armed conflicts;
- non-international armed conflicts;
- internal disturbances and tension.

The Committee carried out protection and assistance operations in the following international conflicts:

- the Greco-Turkish War (1919–23);
- the occupation of the Ruhr (1923–5);
- the ‘Manchurian Incident’ (1931–3);
- the Chaco War (1932–5);
- the Italo-Ethiopian War (1935–6);

Each of these will be discussed in turn in the following sections.

The work of the ICRC during the Russian Civil War, during the events in Upper Silesia and in the Spanish Civil War will be covered in Chapter IX, which deals with the ICRC’s activities on behalf of the victims of non-international armed conflicts.

As the Committee’s activities to help victims of internal disturbances and tension do not come within the scope of this study, they will not be included in it.1

2. The Greco-Turkish War (1919–23)2

The break-up of the Ottoman Empire after the First World War appeared to leave the way open to Greece to restore its pre-eminence in Asia Minor. In May 1919 a Greek expeditionary force landed at Smyrna (Izmir) and began advancing inland. The conflict initially went in favour of Greece, whose forces penetrated deep into Anatolia, but the invasion aroused Turkish
nationalistic fervour and soon met with determined resistance. In August 1922 the Turks scored a decisive victory and on 9 September their troops recaptured Smyrna. Meanwhile, hundreds of thousands of refugees had fled from the fighting in various parts of the country.

An armistice was signed at Mudanya on 11 October 1922, and peace was formalized by the Treaty of Lausanne, signed on 24 July the following year.

The conflict was fought with appalling barbarity on both sides. In the rural areas, where Christians and Muslims were closely intermingled, gangs of irregular troops indulged in an orgy of destruction and killing. Entire regions were laid waste, their villages burnt to the ground, their crops destroyed, their livestock slaughtered and the population massacred or sent fleeing for their lives.

The Lausanne Conference decided that the only solution to the problem was the compulsory exchange of the Greek and Turkish minority populations, thus ending a three-thousand-year Greek presence on the eastern coast of the Aegean.

In this war, where racial and religious hatred led to massacre upon massacre, and where scorched-earth tactics brought about widespread devastation, the ICRC responded in three ways:

- visiting detainees;
- providing emergency assistance;
- repatriating prisoners.

The ICRC twice sent temporary delegations to Greece and Anatolia to visit prisoners of war and civilians held by the opposing sides: the first was in January and February 1922, the second a year later.

During these missions the delegates drew up lists of military and civilian prisoners, resolved many tracing requests from families, examined the prisoners’ conditions of detention and approached the authorities to request any necessary improvements, distributed relief items to the prisoners and arranged for the exchange of medical personnel, the sick and disabled and certain groups of civilian internees.

These activities were a clear extension of the visits carried out by the ICRC during the First World War. But what were the chances of extending such protection to the minority populations, who were hardest hit by the war? In 1921 and 1922 the Committee tried to organize relief missions to the Muslim communities in Thrace and the Christian communities in Anatolia, but met with a point-blank refusal by the authorities.

The rout of the Greek forces in September 1922 resulted in the exodus of hundreds of thousands of refugees – women, children and old people – who sought refuge in a Greece ruined by twelve years of war and overwhelmed by its defeat. The situation was no better for the thousands of refugees pouring into Turkey, where vast areas had been laid waste.

With the help of the Save the Children Fund International Union, the Greek Red Cross and the Turkish Red Crescent, the ICRC mounted a large-
scale relief operation. Even before the cease-fire, it sent missions to Greece and Turkey, where its delegates made an initial assessment of the number of refugees and their needs, encouraged co-operation between the various relief bodies, set up communal canteens and special feeding programmes for infants, and distributed food, clothing, blankets and medical supplies.7

But the flood of refugees was so great that the ICRC’s own resources quickly proved inadequate to ensure their survival. The relief operation was therefore taken over by the High Commissioner for Refugees, with the support of the League of Nations.8 The Committee’s own intervention had essentially been to provide emergency relief.

The Armistice of Mudanya opened the way for all the nations concerned by the status of the Dardanelles and Bosphorus Straits and the restoration of peace in the Near East to meet at the Lausanne Conference.

On 16 January 1923 the Secretary-General of the Conference, René Massigli, informed the Committee that the Greek and Turkish delegations were close to agreement on exchanging interned civilians and some prisoners of war, without awaiting the formal peace treaty:

The two Governments concerned are in agreement for this double exchange to take place under the supervision of a Commission of the International Red Cross including three members chosen by the International Committee of the Red Cross from among nationals of Powers which took no part in the war, plus one Greek and one Turkish representative. The Commission would determine and supervise arrangements for the exchange operations and the transport.9

The agreement between Greece and Turkey was signed on 30 January 1923. It provided for the repatriation of all civilian internees by both sides, regardless of the respective numbers, and of all Turkish prisoners of war in exchange for an equivalent number of Greek prisoners of war, officer for officer and soldier for soldier; the remainder of the Greek prisoners of war were to be repatriated after the signature of peace.

Article 6 called for the establishment of an International Commission, to execute the agreement, comprising three representatives of Red Cross Societies from states that had remained neutral during the World War, as well as one Greek and one Turkish representative. This Commission was entrusted with the task of directing the operation, settling the methods by which they were to be effected and supervising their execution. It was in particular mandated to receive from the Greek and Turkish authorities the hostages and prisoners to be repatriated, verify their number and identity and hand them over to the authorities of the other side; to organize the voyage – for which the Greek government was to provide ships – and to proceed with all research and enquiries necessary to establish the fate of hostages or prisoners of war claimed by one or the other party and not handed over.10

As the neutral members of the International Commission had to be members of Red Cross Societies, the ICRC appointed people from outside its ranks: it called on Colonel Wildbolz, President of the Bernese section of the
Swiss Red Cross and former head of the ICRC’s delegation in Germany, Dr Lindsjö, of the Swedish Red Cross, and Dr Page of Fribourg.11

From 19 March to 4 May 1923 the Commission supervised the repatriation of 4921 civilians (4601 Turkish and 320 Greek internees and hostages) and of 20,118 prisoners of war (Turks: 9748 soldiers and 329 officers; Greeks: 9748 soldiers and 293 officers).12

After this first phase of the repatriations under the 30 January agreement was completed, Col. Wildbolz and Dr Lindsjöe returned home while Dr Page stayed on to conduct the enquiries provided for in Article 6 of the agreement, into the whereabouts of prisoners not accounted for.13

Some five thousand Greek prisoners of war remained in Turkish hands; they were visited by the ICRC in Anatolia during the months of June and July 1923.14

The Treaty of Lausanne, signed on 24 July 1923, ended twelve years of war in the Near East. The International Commission then resumed its work and repatriated the remaining Greek prisoners of war, as well as a number of Greek civilian internees who could not be included in the first phase of the operation. In all, 33,183 civilian and military prisoners were repatriated by the Commission.15

The part played by the ICRC in the operation merits attention. The Commission appointed under Article 6 of the 30 January agreement was not merely given the authority to negotiate or supervise, but was also made responsible for directing and carrying out the operation. While its members were chosen from outside the Committee’s ranks, the Commission acted as though it were part of the ICRC: whenever it encountered difficulties with one side or the other, it asked the Committee for guidance,16 and at the end of the operation it was to the Committee that it made its final report.17

3. The occupation of the Ruhr (1923–5)18

In order to compel Germany to resume payments of the reparations imposed by the peace treaty, the French government decided to occupy the Ruhr: French and Belgian troops entered the valley, with its rich coalfields, on 11 January 1923. Unable to oppose the invasion by force, the German government ordered a campaign of passive resistance in the occupied territories. A general strike, accompanied by riots and acts of sabotage, led to repressive measures by the occupying forces, including the expulsion of German officials and railway staff, internment, hostage-taking, arrests and imprisonment.

German resistance, weakened by the economic crisis and the currency collapse, ended in the autumn of 1923. The occupying troops stayed on until the summer of 1925.

While the invasion of the Ruhr did not, strictly speaking, amount to a war – Germany did not offer armed resistance – it was certainly a show of strength resulting in military occupation, and as such could be compared to a
wartime occupation. The intervention of a neutral intermediary was fully justified.

At the request of the German Red Cross, the International Committee sent a fact-finding mission to the Ruhr in August 1923 to enquire into:

1. Health and economic conditions, the state of hospitals, forced prostitution.
2. Hostages.
3. Expulsions.
4. Prisons.
7. Acts harmful to the prestige and activities of the Red Cross.\(^{19}\)

With the consent of the commander of the occupying forces, the ICRC was able to carry out these enquiries on behalf of the German Red Cross. The delegates made a particular point of checking on the conditions in which prisoners were held: they visited thirteen places of detention housing common law prisoners and hostages as well as detainees arrested on political grounds and sentenced by military tribunals set up by the occupying forces.\(^{20}\) Further ICRC missions were sent to the Ruhr and the Rhineland Palatinate in November 1923 and May 1924, to visit prisoners to whom the German Red Cross could not obtain access.\(^{21}\)

The ICRC does not appear to have carried out any relief activities during these missions; however, the Joint Council of the ICRC and the League of Red Cross Societies\(^{22}\) appealed to National Societies on 30 November 1923 to support the German Red Cross in assisting victims of the disastrous economic crisis in Germany.\(^{23}\)

Two comments may be made on the ICRC’s intervention during the occupation of the Ruhr:

a) As far as is known, this was the ICRC’s first operation in an occupied territory; during the First World War, ICRC delegates had been unable to visit occupied areas, other than in very exceptional cases and then only to visit prisoners of war.

b) The delegates’ mission was not only to visit detainees, but also to make a general assessment of the relations between the occupying forces and the local population.

4. The occupation of Manchuria and the Shanghai incidents (1931–3)\(^{24}\)

For Japan, territorial expansion was seen as the culmination of the economic and social changes that had begun during the Meiji period. China seemed the natural target for Japan’s imperial ambitions: engrossed in its own internal upheavals, unable to restore its cohesion and unity, the old ‘Middle Kingdom’ lay wide open to new encroachments. Japan’s aims, however,
brought Tokyo into conflict with Europe and the United States, which were determined to hold on to their interests in China and were not prepared to give way to an upstart competitor. The national integrity of China, while far from being a political reality, remained a tenet of Western foreign policy, as Japan had learned to its cost in 1895 and 1921.

While the 1929 economic crisis clipped the wings of the Western powers, it rekindled Japan’s ambitions: as its principal foreign outlets closed up, why not carve out new markets by force? By opting for conflict, Japan dealt a lethal blow to the League of Nations’ efforts to establish world peace through collective security and began a period of brazen confrontation which was to last fifteen years and bring about the collapse of the two giants of the Far East.

On 18 September 1931 invading Japanese forces set out to conquer Manchuria and then Jehol province. Unable to put up any valid armed resistance, and with only muted support from the League of Nations, China began a boycott of Japanese imports. The move had a severe effect on the Japanese economy, leading to the closure of many factories and trading firms.

Apparently to force an end to the boycott, Japanese troops landed at Shanghai on 29 January 1932, where they came up against stiff resistance from China’s XIXth army. The fierce fighting took a very heavy toll, and many areas were virtually wiped out by shelling and bombing, sending the local Chinese population fleeing to seek refuge at the gates of the foreign concessions or in the countryside. The events inflamed world opinion, in contrast to the indifference which had greeted the seizure of Manchuria.

The clashes in Shanghai ended with a truce on 3 March 1932, but fighting continued north of the Great Wall. An armistice was finally signed at T’angku on 31 May 1933, after which Japanese forces vacated Shanghai but maintained control of the north-eastern provinces, in which they created the puppet State of Manchukuo. While Japan prepared for fresh conquests, China refused to accept the loss of its territory, so the settlement was no more than an interlude.

Following the Japanese example, the world coyly named the events the ‘Manchurian [or Chinese] Incident’; but such banal terms could not hide the fact that, with the deployment of large numbers of troops and considerable military equipment, a war in all but name was indeed taking place.

The ICRC followed these developments with concern, but what could it do?

On 22 February 1932, the Committee asked the National Societies of both Japan and China whether their governments had opened official information bureaux, in accordance with Article 14 of the 1907 Hague Regulations. It also asked them whether they thought a neutral agency, as provided for in Article 79 of the Geneva Convention on prisoners of war, would be needed.25

The Chinese Red Cross merely replied that the articles in question were being respected, without specifying how. The Japanese Red Cross said that there was no question of the articles being applied, since no state of war
existed between the two countries; it added that the Japanese army in the Shanghai area might be arresting or detaining Chinese soldiers ‘whether in uniform or civilian dress, to exclude immediate danger, but was not holding them longer than necessary’.26

Neither reply was very reassuring.

In the meantime, an ICRC delegate – Sidney Brown – was due to sail from Marseilles on 6 February on his way to Japan. The Committee instructed him to stop off in Shanghai; he arrived on 6 March, just after the fighting had ended.27

Brown immediately contacted the leaders of the Chinese Red Cross, the Japanese military authorities, consular representatives and some Catholic missionaries who knew the area well and were able to help him either as guides or interpreters.28

Together with senior members of the Chinese Red Cross, Brown visited many of the thirty-nine emergency hospitals set up by it, where he saw at first hand the range of injuries caused by the fighting and assessed the facilities for treating them. He also went to the mobile field unit set up by the Hong Kong Chapter of the Order of St John, as well as several Japanese military hospitals.29

Brown also tried to get information about prisoners of war: he found none on the Chinese side, presumably because the Chinese army had remained on the defensive, but met thirteen wounded Chinese soldiers captured by the Japanese and being looked after in hospital. No mention was made of able-bodied prisoners.30

Matters were different with regard to civilian prisoners. Soon after the fighting began, the consular corps had formed a committee to keep track of civilians who had been interned. On 25 February the Japanese authorities allowed committee members to visit the three camps where the internees were being held. The ICRC delegate decided not to visit the camps himself, since they were about to be closed down when he arrived in Shanghai.31

Brown went to several suburbs destroyed by the shelling and bombing, in particular Chapei ‘which looked just like a town in the devastated areas of France in 1918’.32 He also visited much of the region occupied by the Japanese army ‘to see how the Japanese troops behaved towards Chinese civilians, and to find out whether there were people suffering from hunger or sickness who needed help’.33

The areas where fighting had taken place were themselves a cause for serious concern, for whereas the Japanese had cremated their own dead, as their traditions demanded, they had simply left the bodies of Chinese where they lay. There was consequently a great risk of epidemics, and local Chinese groups which were prepared to collect the bodies and perform the traditional burial rites were barred from the areas. Brown and the Chinese Red Cross managed to obtain permission from the Japanese for the burials to be carried out, and under his protection a local welfare group, joined by volunteers from the National Society, placed the remains in coffins and interred them.
The Shanghai region was thus protected from epidemics and the Chinese soldiers were given a decent burial. The delegate was also asked to look into a number of complaints made by the Chinese concerning alleged Japanese violations of the Geneva Convention. Brown, who was expected in Tokyo, left Shanghai on 20 March. From then on the Committee’s contacts with the Chinese Red Cross were maintained by Henri Cuénod, Shanghai representative of the Nansen Office for Refugees, who had previously worked as an ICRC delegate in Greece.

The ICRC had also thought of sending a delegate to Manchukuo but abandoned the idea, apparently believing that he would not have sufficient freedom of action.

What conclusions can be drawn from the ICRC’s intervention in the Manchurian conflict?

The Committee quite clearly was content to make its presence known without trying either to intervene directly on behalf of the victims or to set up independent operations in China. One cannot help thinking that, like the governments and the general public at the time, the ICRC underestimated the gravity of the conflict. It also seems to have been hampered by the fact that war had not been declared; there was a general acceptance of the spurious argument that peaceful relations reigned between Japan and China. Such an attitude seems hardly conceivable today, but at the time respect for certain formalities was still considered an essential factor in international relations: war and peace were seen as two distinct conditions and hostile acts could not be envisaged outside a state of war, which was itself surrounded by a well-defined procedure.

This raised the question of the binding nature of the Geneva and Hague Conventions ‘in the event of armed conflicts in peacetime’, particularly in view of Japan’s flat refusal to admit their applicability. The ICRC felt it necessary to raise the question as to ‘the application, by analogy, of the provisions of the Geneva Convention and the Prisoners-of-War Code in situations of armed conflict not accompanied by a declaration of war’ at the Fifteenth International Conference of the Red Cross, meeting at Tokyo in 1934. The Conference clearly affirmed that the humanitarian conventions should be applied in non-declared wars; the fact that the question had to be discussed at all is indicative of the confusion caused by the ‘Manchurian Incident’.

5. **The Chaco War (1932–5)**

South America gave the appearance of a haven of peace. While the peoples of Europe and the Far East seemed to be continually at each other’s throats,
South Americans had not known war since 1884. But although the Latin American republics had managed to avoid armed conflict, they seemed unable to resolve certain differences that marred their relations: this was notably the case in a border dispute between Bolivia and Paraguay dating back to the mid-nineteenth century.

The bone of contention was a vast wilderness known as the Chaco Boreal or Gran Chaco, virtually uninhabited except for a few Indian tribes. The two countries had been unable to agree on partition of the territory: although they had colonized only the edges of it, each side claimed it all. As the two governments sent patrols ever deeper into the area, establishing forward positions, incidents were inevitable, and clashes began in June 1932, rapidly escalating into open hostilities. From then on the two sides became locked in a futile and wasteful struggle: neither was able to overcome the logistical difficulties of moving over inhospitable terrain without roads and railways, and so each advance cost them dear. Neither was capable of inflicting a decisive victory and finally both were defeated by exhaustion. When hostilities ended in June 1935, both countries were ruined to the point of collapse.

In the summer of 1933 the Committee sent a mission to Paraguay and Bolivia; its members were Emmanuel Galland, a Swiss living in Buenos Aires where he was secretary of the South American YMCA Federation, and Dr Rodolfo Talice, professor of parasitology at the University of Montevideo. The purpose of the mission was to visit prisoner-of-war camps. In Paraguay the delegates went to several military hospitals and 24 internment centres where almost all of the 1200 captured Bolivian officers and men were being held; a few other camps, difficult to reach and containing few prisoners, were not visited. In Bolivia the delegates visited a number of hospitals as well as three camps where 137 Paraguayans were held. The proposals made by the delegates to the two governments for improvements in the prisoners’ conditions were generally accepted. The delegates also obtained permission to organize the repatriation of wounded and sick prisoners: 40 of them were sent home in two operations carried out after the mission.

Apart from this Galland and Talice considered the possibility of opening an information agency for prisoners of war; but as the Uruguayan government had opened a bureau at Montevideo which, in cooperation with the Rotary Clubs of Asunción and La Paz, was ensuring that the prisoners’ mail was forwarded, the ICRC decided not to go ahead.

The conflict continued, however, and the number of prisoners grew. The Committee therefore decided to send another mission in autumn 1934, which was carried out by Lucien Cramer, a member of the Committee, and Félix Roulet; they were accompanied by Galland and Talice.

There were then some 18,000 Bolivian prisoners in Paraguay and 2500 Paraguayans held in Bolivia. The delegates were able to visit the camps freely in both countries and speak with the prisoners in private. They informed the respective governments of any inadequacies they had observed, and as a result the conditions of detention were improved in many ways even before
the ICRC mission ended. The team also managed to persuade both sides to agree in principle to a simultaneous release of more wounded and sick prisoners; this operation took place in May 1935 and enabled 157 prisoners to be repatriated.

The missions sent by the ICRC during the Chaco War clearly served their intended purpose: the delegates were able to bring about distinct improvements in the conditions of detention and negotiated the repatriation of severely injured captives. Generally speaking the ICRC succeeded in carrying out the tasks assigned to it by the 1929 Convention on prisoners of war even though neither Bolivia nor Paraguay was as yet a party to the treaty.

Nevertheless, it could be said that the ICRC’s intervention did not go as far as it might have done: ‘What restricted its scope,’ as André Durand has correctly pointed out,

was the fact that it had no permanent delegation with the two Governments and was obliged to limit its action to two missions, effective as long as their mandate continued, but not as much as they would have been had the ICRC’s representatives been present throughout.

In short, during the Chaco War the ICRC was content to use an operational approach that had been successfully tried and tested during the First World War; it did not seek to broaden its activities by taking new initiatives.

6. The Italo-Ethiopian War (1935–6)

Italy had grown weary of accumulating vast, unprofitable overseas territories – a ‘collection of deserts’. Mussolini dreamed of conquering Ethiopia and acquiring a colonial empire that matched his ambitions. A victory in Abyssinia would also expunge the humiliating memory of Italy’s 1896 defeat by the Ethiopians at Adowa, while providing the Fascist regime with what its dictator wanted above all else: military glory.

Preparations were under way from 1933 onwards in the two Italian colonies bordering Ethiopia – Eritrea to the north, Somalia to the south. The Walwal incident on 5 December 1934, in which Italian and Ethiopian patrols clashed, served as a pretext for a large-scale campaign of provocation and intimidation. While the League of Nations vainly sought to preserve peace, the non-stop passage of ships bringing troops and military equipment through the Suez Canal left little doubt about Mussolini’s intentions.

But the time of the scramble for Africa was past, and by the 1930s the world was no longer willing to tolerate new colonial conquests. Since the overriding concern was to prevent a new global conflict by taking collective action against aggression, no one was prepared to grant a well-armed and more powerful state the right to conquer another independent nation, whatever the former’s claims of having a ‘civilizing mission’ and the latter’s level of development.
Furthermore, Ethiopia had since 1923 been a member of the League of Nations, of which Italy was a founding member; Ethiopia could therefore invoke the protection of the Covenant, in particular Article 10, under which member states undertook ‘to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League …’. Article 16 stipulated that if one member resorted to war in disregard of the Covenant ‘... it shall, *ipso facto*, be deemed to have committed an act of war against all other Members of the League’.

The prospect of collective action by member states did not deter Mussolini, and on 3 October 1935 Italian forces launched an invasion of Ethiopia from the north and south. The struggle was unequal: while Italy had all the trappings of a modern mechanized army – tracked vehicles, tanks, artillery, reconnaissance aircraft and bombers – the Ethiopians had little more than obsolete rifles and a few machine guns. The Ethiopian army was more of a large grouping of feudal warriors, the Emperor himself having limited authority over the local chiefs.50

The hilly, rough terrain was the Ethiopians’ main ally, and for a while they managed to pin down the invaders. But from the spring of 1936 the Italians started using a new weapon against which the Ethiopians were utterly defenceless: mustard gas. The chemical was first used against the front lines, in bombs and shells, and later against positions in the rear, by simply spraying transit and rallying points. Its effect was devastating, spreading panic among both the army and the civilian population. Within a few weeks, Ethiopian resistance was crushed.

The League of Nations, whose authority had already been dented by the Manchurian conflict, could not stand back and watch one member state being taken over by another. With the only weapons it had, it tried to halt this war of conquest which it had been unable to prevent: on 11 October 1935, the League Assembly took note of the Italian aggression and imposed an embargo on sales of arms and munitions to Italy. Economic sanctions came into force on 18 November. The war between Italy and Ethiopia thus turned into a trial of strength pitting Italy against the League of Nations and, more significantly, against the fifty member states which had voted for the sanctions.

For Italy this brought a real risk of economic strangulation: the suspension of credits, a halt to its exports and a ban on some of its imports threatened to paralyse the economy. The country could not put up with this situation indefinitely.

But even at the height of the crisis, the world’s main preoccupation remained the threat posed by the rise of Hitler. Both France and Britain hoped to persuade Mussolini to join a common front to resist the Nazis’ strategy of intimidation and violence, and so those sanctions which could have brought Italy to its knees – an oil embargo and the closure of the Suez Canal – were not used. The other measures were half-heartedly applied and served only to alienate Mussolini for good while doing nothing to help...
Ethiopia. On 5 May 1936 the Italian army took Addis Ababa, and four days later Mussolini proclaimed the outright annexation of the country.

For the League of Nations, this was an unmitigated disaster. It continued to operate for a few more years, but as an empty shell devoid of influence. Governments realized that another way had to be found to ensure their security. Fundamentally, and despite the defunct organization’s subsequent replacement by the United Nations, the very principle of collective security had been irrevocably undermined.

Ethiopia had not taken part in the drafting of the law of war, and at the time of the Walwal incident was not party to any of the humanitarian conventions. The growing external threat made them suddenly more pertinent, and on 15 July 1935, in response to an urgent approach by the ICRC, Ethiopia acceded to the 1929 Geneva Convention on the wounded and sick. In announcing this, the Committee drew attention to the fact that in the event of war the accession would take effect immediately. On 20 September Ethiopia became party to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare. Italy was already party to both treaties, which were thus binding from the start of hostilities. However, despite the ICRC’s urging, Ethiopia did not accede to the 1929 Prisoners-of-War Code.51

The war in Ethiopia presented the Red Cross with a new challenge. For while the Italian army had a well-equipped medical service, supported by a National Society capable of summoning up considerable resources, the situation was quite different on the Ethiopian side: the army had no medical service – there were no Ethiopian doctors – and the country’s medical structure consisted only of a few hospitals set up by missionaries. The Ethiopian Red Cross, created on 25 July 1935 and recognized by the ICRC two months later, barely existed other than on paper. With no medical or public health facilities to speak of, Ethiopia suddenly found itself confronted with the murderous force of modern warfare. The demands to be met by any humanitarian operation would therefore be considerable.

Equally daunting were the obstacles to be overcome: because of the country’s long-standing isolation and its level of development, the remoteness of the war zones, the absence of roads and communications and the danger of bombardment and banditry, the difficulties involved in organizing relief activities appeared insurmountable. To make matters worse, the existing medical structure could offer no local support. The approach used elsewhere since 1863 was completely inapplicable here.

Fortunately, National Societies were not discouraged by these problems, and many of them had begun preparing to help even before the war started. In Geneva, the International Committee was also gearing up for action.

On 4 October 1935, the Committee sent a telegram to the Ethiopian and Italian National Societies, offering its services:

In view opening of hostilities we are at your disposal as per decisions of International Conferences to appeal if necessary for help of sister Societies.
Please indicate type of help possibly needed in terms of personnel, supplies, money.\(^\text{52}\)

The Ethiopian Red Cross replied the following day, requesting medical aircraft, field hospitals and personnel, medical supplies and equipment, as well as a monthly grant of ten thousand pounds sterling for the running expenses of the hospitals.\(^\text{53}\)

The reply by the Italian Red Cross was short and clear:

Italian Red Cross very gratefully expresses sincere thanks to International Committee for its noble and fraternal offer which it greatly appreciates and informs it that the means of assistance available to the Society are sufficient for any eventuality East Africa.\(^\text{54}\)

The two replies reflected the totally different circumstances faced by the belligerents. But the Italian response had the effect of making any intervention by the ICRC and the National Societies of neutral countries one-sided, a situation that was to continue throughout the war. Until then, Red Cross impartiality had generally been demonstrated by the fact that it helped both sides in a conflict; in this war, however, assistance was provided only for the Ethiopians. This was not because the Red Cross refused to help the Italians, but because the Italians declined the help offered.

To provide care for the wounded soldiers was the overriding humanitarian concern. The National Societies of Britain, Finland, the Netherlands, Norway, Sweden and Egypt sent what were then known as ‘ambulances’; these were in fact full-scale mobile hospitals comprising doctors and nurses, medical equipment and supplies, and vehicles. Other Societies sent contributions in cash or in kind. The Ethiopian Red Cross itself managed to form seven such mobile medical units which were led by doctors recruited from Europe or the United States.

Thanks to their superhuman efforts in the face of considerable risks, these units formed the basis of a medical service working behind the front lines and along the Ethiopian army’s main supply routes. A number of Red Cross volunteers were killed or wounded or became chronically ill. But the sacrifices were not made in vain: the Swedish field hospital, for instance, treated more than ten thousand patients, including two thousand surgical cases. Overall the Red Cross succeeded in providing at least a minimum of medical care for the wounded who otherwise would have had none at all.\(^\text{55}\)

The International Committee was also involved: at the start of the war it sent a delegation to Ethiopia consisting of Sidney Brown, from its headquarters staff, and Dr Marcel Junod, a medical delegate.\(^\text{56}\)

Their task was threefold. First, they had to help establish the Ethiopian Red Cross, which had been founded only a few weeks earlier when hostilities began and was quite unprepared to carry out the tasks expected of it. A headquarters had to be organized, an accounting system set up, arrangements made for receiving and monitoring supplies, warehouses installed and contacts maintained with the ICRC and the other National Societies.\(^\text{57}\)
As the Red Cross was acting, by default, as the official medical service, an operational plan for the available medical teams had to be drawn up, taking into account where troops were deployed. This plan was worked out by Dr Junod and Dr Zervos, the Emperor’s personal physician, and submitted for approval to the Emperor, who had overall control of operations. It was then a question of putting the plan into effect, allocating and dispatching the available supplies, organizing convoys and transit warehouses, maintaining liaison between the different units, and a host of other activities. The ICRC team played a major part in carrying out these various tasks.\(^{58}\)

Normally speaking, it should have been the job of the military medical services or the National Society of the recipient country to co-ordinate the work of the medical teams sent by the Red Cross Societies of neutral countries. But in Ethiopia the army had no medical corps and the Ethiopian Red Cross was not equipped to shoulder this responsibility. So under the operational plan approved by the Emperor, the ICRC took over the co-ordination of the foreign field hospitals and maintained liaison between them and Red Cross headquarters in Addis, as well as with the National Societies which had sent them. The ICRC delegates had to meet the teams when they arrived, brief them on their mission, organize the dispatch of supplies as and when needed, evacuate the wounded and sick, and so on. The operational plan had to be adapted to the changing military situation; medical units in danger of being captured by the Italian forces had to be moved away from the front; teams which had suffered losses during shelling or bombing had to be regrouped or merged. When the war was over medical teams working in isolated locations had to be found and brought back to base.\(^{59}\)

Despite its very limited resources, the ICRC delegation was crucial to the successful co-ordination of medical assistance in Ethiopia, particularly with regard to the work of the foreign field units. It also made a decisive contribution to the smooth running of the Ethiopian Red Cross.

Apart from this, the delegation had to deal with problems concerning respect for the international conventions. Two points were of particular importance:

a) Article 11 of the Geneva Convention stipulated that a belligerent which accepted the services of neutral medical units must notify the adverse party. The Convention did not specify the channels through which notification was to be given; in the absence of a Protecting Power, the International Committee assumed this task. Because of the growing threat of air raids, the ICRC did not simply issue a general notification but gave precise details of the position and movements of medical units. This protective notification was extended to include the Ethiopian Red Cross units and the missionary hospitals.\(^{60}\)

b) The fate of prisoners of war was also of concern to the delegates. Even though Ethiopia had not signed the Convention on prisoners, the ICRC considered it its duty ‘to do all we can to ensure that the spirit of such a
Convention is respected’. However, the results of the ICRC’s efforts were disappointing: only five Italian prisoners who had surrendered in singular circumstances were visited and protected, whereas all the delegation’s other attempts failed. Despite repeated approaches to the authorities, it proved impossible to set up an information bureau on prisoners of war or to obtain replies to the numerous requests for information sent by the Italian Red Cross; all indications pointed to the strong probability that captured Italian soldiers were summarily executed. Nor was the Committee able to get information about Ethiopian prisoners in the hands of the Italians. All in all, the ICRC’s work to protect prisoners of war was without avail.

In addition, the ICRC was once again faced with the problem of alleged violations of humanitarian law, and from the beginning of the conflict was approached by both sides with numerous complaints.

The Italians complained in particular of the alleged misuse of the Red Cross emblem which, they claimed, had served to protect buildings that had nothing to do with the medical services, notably Ethiopian army depots and installations. Their protests also related to the alleged use of dum-dum and explosive bullets, as well as the alleged torture, mutilation and massacre of Italian prisoners.

The principal complaints from the Ethiopian side concerned the alleged bombardment of undefended settlements and installations, in particular medical units and hospitals protected by the Red Cross emblem.

The Committee forwarded the complaints it received to the National Society of the accused party, for transmission to the relevant authorities. Complaints, and the replies to them, were mentioned or published in extenso in the Revue internationale de la Croix-Rouge.

This way of dealing with allegations was identical to the practice followed since the Franco-Prussian War of 1870 and which had become standard procedure during the First World War.

However, two developments induced the ICRC to re-examine its procedure: the attacks on medical units and the use of poison gas.

On 30 December 1935, the field hospital of the Swedish Red Cross was bombed near Malka Lidar, behind the Somali front: of the medical team and patients, 28 died and 50 were injured, while most of the equipment and many vehicles were destroyed. The unit had to withdraw to Nugelli, some 300 km further back from the lines.

Dr Junod visited Nugelli and Malka Lidar on 4 January, accompanied by the Swedish consul, Dr Hanner. It was clear from his inspection that the field hospital had been sited in an isolated and clearly marked position:

The Swedish ambulance unit was placed in a perfectly appropriate position with respect to the Ethiopian troops, 25 km behind the lines and 7 km from the Ethiopian HQ. It was working quite overtly, having displayed the signs laid down by the Conventions.
There was every reason to consider that the attack on the Swedish field hospital was deliberate. Coming as it did after the bombing of several other medical units – notably at Dessye on 6 December – the Malka Lidar incident could hardly fail to cause acute anxiety. The central question was the Italians’ willingness, or otherwise, to respect the Geneva Convention.

On 7 January the ICRC President, Max Huber, wrote to Mussolini to express the concern felt by the Red Cross as a whole over the attacks at Dessye and Malka Lidar, and to request, in terms that were as firm as they were polite, guarantees that medical units would be respected:

The International Committee of the Red Cross therefore takes the liberty of writing to Your Excellency with the earnest request that he ensure that all appropriate measures are taken to avoid a repetition of events which are likely to cause grave impairment to the activities of the Red Cross.

The International Committee of the Red Cross is most desirous to receive the details which Your Excellency may feel able to transmit on the subject and which may be of a kind to reassure, in particular, the National Societies concerned.66

Mussolini replied in a letter dated 16 January, affirming that Italy paid scrupulous respect to its international commitments and giving the assurance that the Italian government would do its utmost to avoid the accidental bombardment of medical units.

Il Duce went on to recall the violations which had allegedly been committed by the enemy, in particular the misuse of the protective emblem and the atrocities against Italian wounded, prisoners and dead, and urged that these violations be investigated by the ICRC:

The Italian government can only hope that delegates of the International Committee, selected for the occasion, will go to the area of operations to verify whether and how the standards of the Geneva Conventions are applied or violated by one or other of the parties.67

The same day, the President of the Italian Red Cross wrote to make a fresh protest over a series of alleged violations by Ethiopia, including the misuse of the red cross emblem, the use of dumdum bullets, and atrocities committed against Italian prisoners.68

With the ICRC receiving complaints from both sides it seemed appropriate to have the accusations investigated, under the procedure laid down in Article 30 of the 1929 Geneva Convention:

On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.69

This is precisely what the Italian government had just suggested. The Ethiopian Foreign Minister expressed similar ideas in a telegram sent on 23 January:

Considering recent events Ethiopian government would view with satisfaction dispatch representatives chosen by Intercross to investigate observance provisions
Geneva Convention by both sides. Ethiopian government will give your representatives full facilities.\textsuperscript{70}

So both sides appeared to agree to the holding of an impartial enquiry, to be conducted by the International Committee.

Although well aware that an adversarial enquiry, in which each party would be able to argue its case and reply to the adverse party’s contentions, would have to be carried out by people with specialized medical and legal expertise and that the cost would outstrip its own resources, the ICRC nonetheless immediately agreed to the two governments’ request.\textsuperscript{71}

From that point on, the Committee seems to have devoted all its energies to bringing about this enquiry which, in establishing the facts and the respective responsibilities, would give an important boost to the authority of the Geneva Convention.

However, the agreement of the parties in principle was only the first step. Before the enquiry could begin, more detailed agreement was needed on all aspects of the investigation, such as the powers of the commission of enquiry, its composition, rules of procedure, methods of proof, and so on.

It was mainly to settle these questions that the Committee sent a delegation to Rome in March 1936, led by President Huber. The Italian authorities stated their provisional conditions for the enquiry, which the ICRC found reasonable.\textsuperscript{72}

Similar discussions should have taken place with the Ethiopian government, in order to align the two sides’ positions. But despite repeated approaches by the ICRC delegation in Addis Ababa, the talks never took place. Although there had been reports of further attacks against medical units, it seems that the Ethiopians’ interest in holding an enquiry had gradually waned during the first few months of 1936.\textsuperscript{73} It has to be admitted that faced with poison gas attacks and military setbacks, the Ethiopian authorities had other causes for concern.

In the end the ICRC’s efforts to hold an international enquiry into the alleged breaches of the Geneva Convention failed: without the co-operation of the belligerents it simply could not take place.

In the field, the attacks on medical units continued and intensified. They gave up using the red cross emblem, whose protection had become illusory, and sought the shelter of caves, where they were able to care only for casualties who managed to reach them.\textsuperscript{74}

Meanwhile, a more serious danger had appeared: starting in January, the use of poison gas was reported on several occasions. In a note dated 2 March the Ethiopian Red Cross complained of a series of gas attacks, while in a report dated 12 March Dr Junod mentioned large quantities of toxic gas being used on the northern front. But he added a cautionary note:

Needless to say, all this news was told to me but I was not a witness to any of the facts and I here make the most explicit reservations. Brown and I feel that the question is serious enough for me to make an investigation on the spot, as our aeroplane has to leave for Kworam very soon.\textsuperscript{75}
Dr Junod went to Kworam on 16 March with Count de Rosen, the Swedish Red Cross pilot. The next day they saw for themselves the use of toxic gas during a bombing raid which destroyed their own plane:

No sooner had we arrived than three Italian bomber planes flew over the plain of Kworam, recognizing the aircraft despite their camouflage, and at once began a real bombing raid. The Government’s plane, 200 metres away from ours, was the first to be hit and burned like a torch. Seeing this, de Rosen and I decided to go to our plane and remove the camouflage in order to show the signs and so avoid a severe loss. We came down the hill through the bombs, hiding under the few miserable trees or bushes and quickly arrived at the edge of the plain. There we were stopped by a strong smell of mustard gas.76

On 18 March, Junod witnessed the spraying of toxic chemicals:

That evening I was walking to the British ambulance unit and I had occasion to see with my own eyes an Italian aircraft spraying the ground with an oily liquid, dropping like fine rain and covering a huge area with thousands of droplets, each of which, when it touched the tissues, made a small burn, turning a few hours later into a blister. It was the blistering gas the British call mustard gas. Thousands of soldiers were affected by severe lesions due to this gas ...77

Dr Junod went on to describe conditions in the plain of Kworam, which he called ‘utter hell’:

Living in the mountains in rough shelters are some fifty thousand soldiers, among them the last troops of His Majesty, the Imperial Guard. The Emperor himself seemed to me to be wearied of this terrible war waged by the Italian air force, wounding hundreds of soldiers and burning them with this horrible gas. I myself have seen crowds of wounded men crying out in front of the Emperor’s shelter, ‘Abiet, abiet’, which means ‘Have pity’, for all of them, I mean all those unable to move themselves, are without any treatment, without doctors, and dying like flies. The two ambulances, Dutch and British, are immobilized in their shelters, unable to move because of the Italian planes ...78

The International Committee received Dr Junod’s report on 9 April. Three days later it wrote to the President of the Italian Red Cross to voice its alarm; after mentioning information it had received from doctors of various medical teams, Ethiopian and foreign, the Committee cited Dr Junod’s report:

The day before yesterday we received from Dr. Junod, our delegate, circumstantial details which we believe we should communicate to you. On 17 March, at Kworam, on two occasions, Count de Rosen, pilot of the Swedish ambulance unit, and Dr. Junod, delegate of the International Committee, were moving in the direction of their aircraft when they were halted by gusts of mustard gas released by the bombs all around. This statement could leave room for the interpretation that the bombs, of whatever nature, gave off suffocating vapour when exploding. Such could not be the case for the following observation made by Dr. Junod on 18 March. He had the opportunity to see with his own eyes an Italian aircraft spraying the ground with an oily liquid, dropping like fine rain and covering a huge area with
thousands of droplets, each of which, when it touched the tissues, made a small
burn developing a few hours later into a blister. According to Dr Junod, this was
the blistering gas called mustard gas. Thousands of soldiers are suffering from
severe lesions due to this gas...

We think we should bring these statements to Your Excellency’s knowledge.
The use of a prohibited weapon is such as to arouse feelings whose gravity you
cannot fail to appreciate. According to our delegate, such conduct might even
paralyse all work by the Red Cross in the regions affected.79

The President of the Italian Red Cross replied on 11 May, arguing that the
1925 Geneva Protocol did not explicitly forbid the use of chemical weapons
as a means of reprisal against the type of atrocities which had, he claimed,
been inflicted on Italian prisoners in Ethiopia.80 The Committee did not wish
to be drawn into a legalistic argument as to the extent and limits of the right
to reprisals; in replying to the Italian Red Cross, it insisted that from the
humanitarian point of view, held by both the ICRC and the Red Cross as a
whole, chemical weapons should be banned altogether.81 The Committee
further stressed that Red Cross units must be protected from all forms of
reprisals:

If, in the rules laid down in the Conventions for making war less inhuman, there is
not at least a strict limit to the right, unfortunately ill-defined, of reprisals, then
the whole system is in danger of breaking down. That limit is marked by the
distinctive sign of the Red Cross. The Geneva Convention is not merely the
earliest of the Conventions to protect humanitarian interests in wartime, it is also,
and must remain, the central and inviolable component.82

The Committee’s position could hardly have been clearer.

The use of gas in Ethiopia had not only aroused indignation in official
circles, but had also inflamed public opinion. It was felt that if the 1925
Protocol could be so lightly brushed aside, nothing could protect the
population of the cities of Europe or elsewhere from annihilation by chemical or
bacteriological weapons in the event of a new global conflict.

Following a complaint from the Ethiopian government, the League of
Nations’ Committee of Thirteen took up the question of violations of the
laws of war in Ethiopia.83 On 8 April 1936 the League’s Secretary-General,
acting in the name of the Committee of Thirteen, wrote to the ICRC request-
ing it to communicate any information emanating from its delegates or from
other impartial sources, such as doctors of Red Cross ambulance units, about
violations of international conventions on the conduct of war that had been
signed by both belligerents. The Secretary-General made particular mention
of the reports from Dr Junod and the doctors in the Swedish ambulance
unit.84

This request put the Committee in an awkward position. The ICRC was
perfectly aware of the humanitarian importance of ensuring respect for
the law of war, in particular the Geneva Protocol. Seen from this angle, the
ICRC’s aims were similar to those of the Committee of Thirteen. But on the
other hand, the reports in question constituted damning evidence against Italy, and injecting them into a public debate would have put the ICRC in the position of a witness for the prosecution, if not that of a judge. Moreover, the League of Nations had taken sides in the war between Italy and Ethiopia: cooperation with one of its organs would inevitably have been detrimental to the ICRC’s reputation of impartiality.

The International Committee concluded that it was unable to accede to the request, and informed the Secretary-General of its decision on 9 April:

The two governments engaged in the conflict have expressed the wish that an enquiry be undertaken by the International Committee into the allegations made by each side concerning violations of the Geneva Convention. The International Committee, anxious to help the two parties to the best of its ability in satisfying that wish, has immediately taken up contact with them on the subject. Until a final decision has been taken – which we hope will lead to a successful outcome – the International Committee feels that it cannot hand over its documentation for the purposes of another inquiry relating, in part, to the same circumstances.

Moreover, independently of current negotiations concerning the inquiry, the neutrality which the International Committee of the Red Cross is obliged to observe imposes a very high degree of discretion. In particular, the International Committee does not consider itself able to communicate information received from its own delegates or entrusted to it as an international body of the Red Cross, if the inquiry is other than that provided for in the Geneva Convention to investigate alleged violations.

Any other information supplied to the ICRC by governments or National Red Cross Societies may be made available by them as they themselves see fit.85

Naturally enough, this reply did not satisfy the Committee of Thirteen whose Chairman, Salvador de Madariaga, expressed his disappointment:

The Committee of Thirteen cannot but regret this decision greatly, the more so since the letter from the Secretary-General on 8 April clearly indicated that the points on which particulars were asked for – there was no question of handing anything over – from the documentation in the possession of the ICRC included a considerable number of important matters unrelated to the Geneva Convention.

It would further seem from your letter that the ICRC considers itself unable to communicate any information received, even on matters not coming within the scope of the Geneva Convention, because the neutrality it is pledged to observe imposes a very high degree of discretion.

The Committee of Thirteen can only express its surprise to see such a reason invoked to justify a refusal to communicate information to a body which is acting in the name of the League of Nations.86

The International Committee was thus forced to justify its position. On 24 April President Huber sent Mr de Madariaga a further letter in which he recalled the Statutes of both the International Red Cross and the ICRC, and went on to stress, once again, the ICRC’s purely humanitarian and charitable nature:

The purpose of the ICRC is purely humanitarian and apolitical: the Committee must first and foremost do everything it can to relieve the sufferings of victims of
war. To do so, it must adhere scrupulously to a line of conduct enabling it to maintain relationships of trust with parties to a conflict, even in cases where the Geneva Conventions may not be legally applicable. The International Committee also considers itself unable to depart from these principles even in the event of conflicts where the right to go to war is in dispute.87

These exchanges between the ICRC and the League of Nations had been published by the latter. A large body of public opinion did not understand why the ICRC had refused to co-operate with an organ of the League with the aim of exposing blatant violations of the law of war. Not only was the decision criticized but also the stated reasons for it, which some observers put down to pro-Italian leanings rather than the strict application of principles.88 The ICRC therefore felt it had to explain its position. First, it sent a circular to National Societies, sharing with them the exchange of correspondence with the League of Nations and saying that it had no doubt the National Societies would understand the discretion which the ICRC was obliged to maintain – in accordance with the Statutes of the International Red Cross as well as its own Statutes – with regard to any action which might be of a political nature.89

Public opinion also had to be addressed and a reply made to the criticisms of the ICRC’s policy of discretion. To this end President Huber wrote an article in the May 1936 edition of the *Revue internationale de la Croix-Rouge*, entitled ‘Croix-Rouge et neutralité’.90

President Huber’s intention was not to stir up further controversy but to emphasize the general principles which had to guide the work of the Red Cross – in particular that of the ICRC. He reminded his readers that the principles of neutrality and impartiality were the cornerstones of the movement’s work and were essential to the acceptance of the Red Cross by parties to a conflict; he stressed the fundamentally humanitarian and charitable nature of the Red Cross; and then he came to the question of respect for the humanitarian conventions:

International Conventions, clearly, are only of value in so far as they are observed. The International Red Cross Committee is, therefore, bound, *inter alia*, to receive all complaints made regarding alleged breaches of the Conventions; among the latter the Geneva Convention calls for its special, but by no means exclusive, attention. The International Committee receives these complaints chiefly from the national Societies but it gives consideration also to any protest relating to humanitarian interests which seems to be justified. It has, moreover, the right of initiative and can itself take in hand certain cases about which no complaint has been made but which, in its opinion, justify its spontaneous intervention.

At the same time, even when dealing with breaches of the Conventions or with any act that is a violation of humanitarian principles, the International Red Cross Committee has no intention whatsoever of sitting in judgment. It is not a court of justice and, besides, it has not itself the means of ascertaining the facts, which alone would enable it to give a verdict. As a general rule, therefore, it merely
transmits the protest emanating from other quarters, or from itself, to the national Society of the country which is accused of the breach or of the act of inhumanity .... In contrast to freely organized groups of private individuals, and to organizations which have entire liberty to vent, in resounding demonstrations, their emotion or indignation in respect to acts which they condemn, the Red Cross, and in particular the International Red Cross Committee, have to exercise great caution and self-command. This is not due to indifference or to lack of courage but is a result of the responsibilities devolving on an organization which must always be in a position to afford all parties the guarantee of as unbiased a judgment as possible and of action free from every suspicion of partiality, political or other.91

In the meantime the war had ended. On 5 May Italian troops entered Addis Ababa, and four days later Mussolini proclaimed the creation of the Italian East African Empire. The time had come for the Red Cross to take stock of its work in Ethiopia. Although the movement had, through great sacrifice, achieved some remarkable results, it was evident that the Red Cross had nonetheless suffered setbacks which could not simply be disregarded.

The President of the Swedish Red Cross, in particular, called for an in-depth examination of recent experiences in Ethiopia in order to ensure that the humanitarian conventions would be fully applied in future and to guarantee respect for the emblem, without which the work of the Red Cross was at grave risk.92

This review took place at a special meeting of National Societies in Paris in November 1936.93 Once again, President Huber spelt out the Committee’s position on alleged violations of the conventions:

The essential task of the Red Cross is to assist victims of war, first and foremost wounded and sick soldiers. The task of delegates of the International Committee must in principle be the same.

It is true that the International Committee also has the responsibility of ensuring respect for the principles of the Geneva Convention and for the principles of the Red Cross in general. This being the case, it can receive complaints over alleged breaches. Its normal course of action is to transmit these complaints to the adverse party, usually through the Red Cross Society of the country said to be at fault. The International Committee can also take the initiative itself; it is even entitled to make a direct approach to a government that may be responsible for such breaches.

This aspect of the International Committee’s work is to denounce violations of the Red Cross principles, to ask for explanations, and to demand an end to those violations, if they do indeed exist; but it cannot, of its own accord, simply pass judgment. No one can do so without first having held an enquiry which brings to light the facts as a whole and as seen by both parties. This is not just a fundamental requirement for all forms of justice, it is also, we believe, an inevitable corollary to the great principle behind the Red Cross: that of impartiality.

The International Committee is not, as a rule, in a position to make investigations enabling it to give an opinion concerning the alleged infraction. If,
in special circumstances, a delegate of the International Committee is able to make useful findings he will do so for the information of the ICRC; but any report he may make cannot automatically constitute a complete and objective statement of the facts in question. There are various reasons for this. Generally, the delegates are not selected for such work, far more difficult and delicate than is realized by those with no experience of the profession of examining magistrate. But even were they trained for such a task, they usually have knowledge of only one aspect of an event under dispute. For these reasons, the International Committee must be extremely circumspect in its use of such documents or reports, in spite of the risk that its discretion may not be understood in all quarters.

What we have to obtain, if possible, is an impartial statement of the facts, free of any resentment and prompted solely by the desire for justice. Such action is not of course confined to the Red Cross or the International Committee in particular. But if the trust enjoyed by the International Committee leads parties to a conflict to request it, as an impartial body, to investigate acts of war of concern to the humanitarian work of the Red Cross, the International Committee cannot shrink from the task.94

What conclusions can be drawn from the work of the Red Cross and the ICRC’s involvement during the war between Italy and Ethiopia?

Quite clearly, the Ethiopian campaign was a new challenge for the Red Cross: the work to be done was immense and the difficulties enormous. But the Red Cross met the challenge with considerable success. Neither the feudal structure of Ethiopia, nor the practical problems, nor even the threat of bombing prevented the accomplishment of a large-scale relief operation. The results matched the scale of the risks and the sacrifices: the wounded and sick were assisted in their thousands, victims who otherwise would have been left completely unaided.

In this operation, the International Committee certainly played a key part. In the absence of any official medical service, and because of the weakness of the fledgling Ethiopian Red Cross, the ICRC took on most of the job of coordinating international Red Cross assistance in the field – a role it was often to play in the future.

But the Committee’s work was hampered by the fact that it was only able to work on one side. This situation – a result of the stance taken by the Italian Red Cross at the beginning of the war – was a serious handicap, particularly with regard to the protection of prisoners of war. There can be little doubt that the ICRC would have been in a better position to exert pressure on the Ethiopian government over the treatment of Italian POWs if it had had delegates in Eritrea and Somalia visiting and protecting Ethiopian prisoners in Italian hands.

During the conflict the ICRC was once again faced with the problem of violations of humanitarian law, prompting it to reconsider its approach to them in the light of new legal provisions, in particular Article 30 of the 1929 Geneva Convention.
The ICRC adopted two courses of action:

a) It continued, as in the past, to pass on the complaints it received and used its influence to try to halt violations brought to its attention either by its own delegates or by the injured party; this was the practice followed during the First World War.

b) It agreed, at the request of the two belligerents, to conduct an impartial enquiry under Article 30 of the Geneva Convention into alleged violations by both sides. The holding of such an enquiry would have clearly enhanced the authority of the Convention and of humanitarian law as a whole by enabling an impartial third party, with the consent of the opposing sides, to determine the existence of facts which might constitute violations of the laws and customs of war. This was an unprecedented task, for which the Committee agreed to go beyond its traditional role and to carry out a quasi-judicial mandate. The ICRC’s efforts ultimately failed, but they showed how far the Committee was prepared to go to help implement Article 30.

Experience of the hostilities in Ethiopia thus led the ICRC to redefine its position on alleged violations of humanitarian law. While not abandoning its previous approach, the Committee learned lessons from the conflict enabling it to formulate a new policy adapted to the changed legal situation. This policy was to guide it in its work throughout the Second World War; it has remained valid, with minor adjustments, to the present day.

The Italo-Ethiopian War also raised, for the first time in practical terms, the question of Red Cross intervention in a conflict in which the League of Nations was taking collective action.

What were the points of convergence and divergence between the principle of collective security, which the League was trying to enforce, and the principles of humanity and impartiality on which Red Cross work is based?

The question can be broken down into two parts:

a) Were the humanitarian activities of the Red Cross and collective action against a country which violated the Covenant of the League of Nations mutually exclusive?

b) Was it possible for the Red Cross to co-operate with the League when the latter was engaged in collective action?

The first question had been answered, as a matter of principle, at the second session of the League’s Assembly, for by its resolution of 4 October 1921, the Assembly accepted that the severance, under Article 16, of relations with a covenant-breaking state need not bring about the suspension of humanitarian relations. In other words, collective action by the League of Nations was no obstacle to the work of the Red Cross. In the case of Ethiopia, the ICRC offered its services to both sides, regardless of the League’s moves to condemn Italy and the sanctions it was preparing to impose; the ICRC’s
position does not seem to have created any difficulties or to have aroused any criticism.

The question of co-operation between the Red Cross and the League of Nations was raised more specifically by the Committee of Thirteen’s request. By refusing to provide the information asked for, the International Committee clearly showed that, in its opinion, the principle of impartiality prevented it from co-operating with a body engaged in collective action. It may be concluded that if the ICRC so emphatically stressed its obligation to ‘remain outside any action which might be of a political nature’,\textsuperscript{96} even though the Committee of Thirteen’s enquiry had largely the same objectives as the one the ICRC was hoping to carry out, it was because the League of Nations was itself engaged in a lethal struggle with one of the belligerents.

7. The Sino-Japanese conflict (1937–9)\textsuperscript{97}

No one had any illusions about the durability of the T’ang-ku Truce, which had ended the ‘Manchurian Incident’: while China could not accept the loss of its north-eastern provinces, Japan was preparing for fresh conquests. Sooner or later, renewed hostilities seemed inevitable.

On 7 July 1937 Japanese and Chinese troops clashed near the Marco Polo bridge on the outskirts of Peking. After several days of negotiations, during which both sides rushed reinforcements to the area, fighting broke out again on 26 July. On the same day, Japanese forces occupied Peking and began advancing to the south and west: Shanghai was seized in November and Nanking on 14 December. A year later, after eighteen months of fighting, Japanese troops controlled the coast as far as Canton and the interior as far as Hankow. But despite these successes, the Japanese army had failed to break the resistance of China’s Nationalist government, which had withdrawn to Chungking, or that of the Communist forces which were waging a fierce guerrilla campaign behind the invader’s lines.

In an overpopulated and destitute country already suffering from years of upheaval, the Japanese invasion had appalling consequences for the Chinese people. On top of the loss of life and the extensive destruction brought about by the war, further widespread death and devastation was caused by exceptionally severe floods.\textsuperscript{98}

The legal position was unclear, for to get round United States legislation, which barred the sale of arms to countries in conflict, neither Japan nor China acknowledged the existence of a state of war. While huge armies thrust ever deeper into Chinese territory, while Japan’s navy blockaded the coast and its air force bombed cities further inland, people referred euphemistically to the ‘Chinese Incident’, just as they had spoken of the ‘Manchurian Incident’ a few years earlier.
But this term was as misleading as the previous one, for the conflict had all
the characteristics of an out-and-out war conducted without quarter, leaving
a trail of horror in its wake – massacres, looting, destruction, chaos, econ-
omic ruin, famine and epidemics.

Confronted with this new Far Eastern conflict, what course of action was
open to the ICRC?

The Committee was urged by the Chinese Red Cross to send a delegate to
Shanghai. Anxious to maintain the principle of bilateral action, it contacted
the National Societies of both countries on 14 August 1937 to offer its ser-
vices and those of sister Societies.99

In a telegram dated 17 August, the Japanese Red Cross thanked the
Committee for its offer but replied that it had adequate means at its disposal
doing any eventuality arising from the current situation.100 It was a
polite but firm rejection of help.

On 20 August the Committee decided to send a delegate to Shanghai, ‘in
order to ascertain as closely as possible the situation of the Red Cross in the
area affected by the conflict’. It appointed Col. Charles de Watteville, former
League of Nations representative in the Middle East, who left Geneva on
3 September and arrived in Shanghai on the 22nd.101

Col. de Watteville stayed in China for two months. He was then replaced
by Dr Louis Calame, a Swiss doctor who had lived in Shanghai for several
years, who remained the ICRC’s representative to the Chinese Red Cross
until the delegation closed in May 1939. The Committee’s active presence in
China lasted twenty months in all.102

The delegation’s principal tasks were to identify needs and to serve as a
liaison: the delegates made regular visits to civilian and military hospitals,
refugee reception centres and relief distribution centres set up by the Chinese
Red Cross and the many aid groups which were trying to alleviate the suffer-
ing of the victims. As the Chinese Red Cross had opened a number of hospi-
tals, not only in the main towns but also near the front lines to make up for
the scant resources of the army’s medical corps, the delegates often had to
close from Shanghai to other centres, such as Nanking, Canton and
Hankow.103

The Committee was not represented in territory occupied by Japan. But
during the summer of 1938 Dr Calame was able to visit the northern
provinces of the country ravaged by terrible floods: the Yellow River had
burst its banks and changed course for more than 600 kilometres, while the
Imperial Canal had flooded populated areas around Tientsin. The ICRC
widely circulated Dr Calame’s report on his inspection tour of more than
10,000 kilometres through the stricken areas.104

The delegates’ many missions and enquiries kept the Committee regularly
informed on how the situation was developing and on the work and needs
of the Chinese Red Cross and other humanitarian institutions. The ICRC in
turn briefed National Societies which wanted to assist their Chinese
counterpart.105
Dr Calame also worked with the Chinese Red Cross in organizing the reception and forwarding of relief sent by the ICRC or the National Societies. The Chinese Society had become increasingly isolated after having to leave Shanghai and then Hankow. With the closure of the Canton-Hankow railway, the only remaining link with the outside world ran via Kunming and Hanoi through French Indochina. With the help of Dr Calame, the Chinese Red Cross set up a service to take delivery of relief supplies at Haiphong for the non-occupied territories, and at Hong Kong for areas controlled by the Japanese.\footnote{106}

In their attempts to provide protection for prisoners, the delegates came up against insuperable difficulties. Japan had signed the 1929 Geneva Convention on prisoners of war, but had not ratified it. The Committee therefore asked de Watteville, who was due to visit Tokyo, to seek assurances from the Japanese government that the Convention would be respected. The Deputy Foreign Minister did assure him that the Convention would be ‘taken into account’, but a few days later the government contradicted its representative by announcing that the Convention contained provisions which were not adapted to the Far East.\footnote{107}

The delegates did what they could to visit prisoners, but with little success. De Watteville was allowed into two camps of Chinese held by the Japanese – 32 prisoners – and a single camp of Japanese in Chinese hands – 21 prisoners, all airmen. In June 1938 Dr Calame visited about 100 Chinese prisoners – servicemen and civilians – held on Amoy island, which had been captured by the Japanese a few weeks earlier. The many other approaches made by the delegates towards both sides received vague replies. It was not even possible to gather any coherent information about what had happened to the vast majority of prisoners; their identity, and that of the wounded and dead, were not registered. The delegates’ efforts met with utter incomprehension: both sides were astonished at the ICRC’s concern about prisoners, whether military or civilian.\footnote{108}

As in the Spanish Civil War, which was taking place at the same time, great use was made of bombers in air attacks not only against the enemy lines but also on cities and towns in the rear.

From the autumn of 1937 a series of heavy air raids on the main Chinese cities – especially Shanghai and Nanking – struck indiscriminately at military targets and the civilian population. Not even hospitals and relief workers were spared.

These attacks threatened a fundamental and well established principle of humanitarian law, namely that a distinction must be made between military objectives and the civilian population. The International Committee obviously had to take a stand on this issue, as it had done on 15 February 1938 over the bombing of towns in Spain.\footnote{109}

The fact was that Japan had overwhelming air superiority; the Chinese air force was incapable of mounting bombing raids on Japan and it had no interest in attacking Chinese cities, other than to strike at well-defined military objectives. The guilty party, essentially, was Japan.\footnote{110}
However, true to its customary procedure during the First World War, the ICRC sent its appeal of 5 March 1938 to both sides:

Among the many evils which may strike the civilian population in time of war, the most terrible are surely those caused by aerial bombardment, the fatal ravages of which make so many innocent victims, especially among women and children.

For this reason, taking its stand on the liberty granted by its statutes to take any humanitarian action entering within its traditional role, the International Committee regards it as a duty to make an extremely urgent appeal today to the Governments of China and Japan. Without wishing or indeed being able to appreciate the nature of the air operations which may have been carried out hitherto in the course of the present conflict in the Far East, the International Committee, prompted solely by its wish to prevent some of the tragic consequences of the air war, urges the Chinese and Japanese authorities to do all in their power to abstain from any air raids on places not strictly military targets.

The International Committee hopes that this appeal will be received the more favourably since it expresses the substance of a clause included in the Regulations annexed to the Fourth Hague Convention of 1907, to which China and Japan are parties. In effect, under the terms of Article 25 of the said Regulations, it is prohibited to attack or bombard, by whatever means, towns, villages, dwellings or buildings which are undefended.111

The appeal was met with total silence by both recipients.112 The Committee, when informing National Societies of the step it had taken, felt compelled to explain yet again the purpose of the appeal:

Without presuming to make any judgement on the nature of air operations which may have been carried out in the course of the conflict, the International Committee desired to appeal earnestly to the parties involved, urging them to do their utmost to avoid any raids affecting the civilian population behind the lines or places other than strictly defined military targets.113

What conclusions may be drawn from the Committee’s work in the Sino-Japanese conflict?

The ICRC without doubt played a significant role in the fields of information and liaison, helping the efforts of National Societies which wanted to assist the Chinese Red Cross.

But in assessing any intervention by the Committee, the main criterion must be its ability to discharge its own responsibilities, namely to act as a neutral intermediary between the belligerents and to protect the victims of armed conflict, in particular people who have fallen into the power of an enemy.

In these two respects the ICRC’s efforts clearly failed, as a comparison of the aims set out by the ICRC in its 344th Circular to Central Committees of 6 November 1937 with the results actually achieved would readily confirm.114
Two reasons for this are immediately apparent.

First of all, the Committee was handicapped – as it had been in Ethiopia – by the fact that it was present on only one side. Charles de Watteville’s short mission to Tokyo in November 1937 could not compensate for the absence of any permanent representation in Japan itself or with the Japanese military command in China. The work of the ICRC can never be fully effective unless it is carried out simultaneously on both sides; being a neutral intermediary demands no less. By working on only one side, problems were inevitable.

Secondly, the ICRC’s means were tragically inadequate. As André Durand rightly points out, the situation in China at the time was comparable to that in Europe just after the First World War: whole provinces had been devastated by fighting or floods, the communications network had been destroyed, everything was in turmoil, the population was decimated by hunger and disease. The disaster was of continental proportions and the need for help immense.

On the other hand, the ICRC’s resources were non-existent. When the Sino-Japanese conflict broke out the Committee was already facing financial difficulties which were forcing it to scale down its work in Spain. Drawing on its own reserves, the ICRC could just afford to send one delegate to China; his expenses were largely covered by the Chinese Red Cross. The limited assistance which the Committee sent to China was a drop in the ocean compared to even the most pressing needs. Finally, in May 1939, the ICRC’s financial constraints obliged it to end Dr Calame’s mission, even though the war was continuing and the situation faced by the Chinese Red Cross – as indeed by China as a whole – was becoming more difficult than ever. Financial problems therefore appear to be the second reason for what was undoubtedly the Committee’s failure in China.

But beyond these obvious causes, two other factors should be taken into account.

First, there was the belligerents’ total incomprehension of the humanitarian message which the ICRC was trying to get across. This lack of understanding showed itself in different ways, but most noticeably with regard to the ICRC’s efforts on behalf of prisoners. Both Japan and China had taken part in the drafting of humanitarian law, whose universality was therefore taken for granted. But in this war, one of the belligerents let it be known that humanitarian law was not adapted to conditions prevailing in the Far East, while the other seemed powerless to enforce it.

Secondly, one cannot help thinking that the Committee, and even more so the National Societies and the governments of Europe and North America which traditionally supported the ICRC, did not grasp the importance of what was happening in the Far East. Confusion over the situation in China, the difficulty of assessing priority needs and the scope for action, and the feeling that the resources available were insignificant compared to the overall distress probably left all good intentions paralysed. But the decisive element was the course of events in Europe itself: in a continent sliding inexorably...
towards war, all eyes were fixed on developments in Spain and on the Rhine. The great ideal of international co-operation was foundering, and the Red Cross Societies were anxious above all to husband their resources against the day of renewed conflict which, as international relations steadily deteriorated, was becoming inevitable.

Notes


6 There were around 1,500,000 Greek refugees and some 600,000 Turkish refugees.

7 *RICR*, no. 46, October 1922, pp. 920–8; no. 47, November 1922, pp. 951–71.

8 *RICR*, no. 47, November 1922, pp. 972–9; no. 48, December 1922, pp. 1108–9.

9 Letter from the Secretary-General of the Lausanne Conference to the ICRC, 16 January 1923, *RICR*, no. 49, January 1923, pp. 45–6; the ICRC gave its agreement on 17 January and contacted the Secretary-General and the Greek and Turkish delegations in order to clarify the Commission’s duties. *RICR*, no. 52, April 1923, pp. 411–2; see also Durand, *From Sarajevo to Hiroshima*, pp. 223–4.


11 *RICR*, no. 50, February 1923, pp. 150–2.


The difference in the numbers of Greek and Turkish officers released in the first phase of the operation stems from the fact that the belligerents had already released military doctors and chaplains as well as some disabled prisoners who were not then counted among those repatriated under the terms of the 30 January agreement. In an understanding signed at Smyrna on 17 April 1923, Turkey undertook to release a further 30 Greek officers in order to maintain the strict numerical parity demanded by the 30 January agreement. Note from Col. Wildbolz to the ICRC with attachments, 18 April 1923, ICRC Archives, file Mis. 57. A.5.
16 *RICR*, no. 52, April 1923, pp. 411–16.
19 *RICR*, no. 59, November 1923, p. 1070.
20 *RICR*, no. 59, November 1923, pp. 1069–96 (report by Dr Albert Reverdin, head of the mission).
22 The League of Red Cross Societies is the federation of the National Red Cross Societies, created in May 1919 with the aim of encouraging co-operation between its members and the development of their peace-time work, notably in the fields of public health and relief for victims of natural disasters. On 1 April 1921 the ICRC and the League reached an agreement defining the two bodies’ respective fields of action; the agreement established a joint council of six members to facilitate co-operation in areas of common interest.
23 *RICR*, no. 59, November 1923, pp. 1138–9; no. 61, January 1924, pp. 44–53.
27 Brown’s mission report was published in *RICR*, no. 164, August 1932, pp. 639–75.
36 *RICR*, no. 159, March 1932, p. 264.
37 Durand, *From Sarajevo to Hiroshima*, p. 271.
38 ‘In this first period of the Sino-Japanese conflict, the ICRC had therefore tried to assert its presence, though without carrying out any activities of the traditional kind, probably limited by the unusual circumstances of the war.’ *Ibid.*
39 The term ‘in the event of armed conflict in peacetime’, which underscores the uncertainty over the legal appraisal of the events in Manchuria and Shanghai, was used by Sidney Brown in his mission report. *RICR*, no. 164, August 1932, p. 668. The Japanese government’s position was stated in the telegram of 10 March 1932 from the Japanese Red Cross to the ICRC. *RICR*, no. 159, March 1932, p. 263.
40 *RICR*, no. 172, April 1933, p. 368.
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42 L’intervention du Comité international de la Croix-Rouge en Amérique latine, pp. 5–6.

43 Ibid., pp. 6–16.

44 Ibid., pp. 16–19.


46 RICR, no. 195, March 1935, pp. 159–78.


48 Durand, From Sarajevo to Hiroshima, p. 273.


50 Durand, From Sarajevo to Hiroshima, p. 296.


53 Ibid.

54 Ibid.

55 Rapport général du Comité international de la Croix-Rouge sur son activité d’août 1934 à mars 1938, pp. 72–85.

56 Ibid., p. 87.

57 Ibid., pp. 88–9.

58 Ibid., pp. 90–4.


60 RICR, no. 205, January 1936, pp. 61–5; Rapport général du Comité international de la Croix-Rouge sur son activité d’août 1934 à mars 1938, p. 95–6.

61 Letter from Jacques Chenevière to Sidney Brown, 12 February 1936, p. 5, ICRC Archives, file CR 210/00-XIV; Durand, From Sarajevo to Hiroshima, p. 298.


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64 Junod, Warrior Without Weapons, pp. 40–50; Durand, From Sarajevo to Hiroshima, pp. 299–301.

65 Dr Junod’s report, 13 January 1936, p. 5, ICRC Archives, file CR 210; Durand, From Sarajevo to Hiroshima, p. 300.

66 Letter from Max Huber to Mussolini, 7 January 1936, RICR, no. 205, January 1936, pp. 70–1.


70 Telegram from the Ethiopian Minister of Foreign Affairs to the ICRC, 23 January 1936, ICRC Archives, file CR 210-V (the term ‘Intercross’ is the telegraphic address of the ICRC).

71 RICR, no. 206, February 1936, pp. 152–3.

72 RICR, no. 208, April 1936, pp. 304–5.

73 Durand, From Sarajevo to Hiroshima, pp. 304–5.


75 Dr Junod’s report, 12 March 1936, p. 3, ICRC Archives, file CR 210; Durand, From Sarajevo to Hiroshima, p. 305.


77 Dr Junod’s report, 24 March 1936, p. 3; Durand, From Sarajevo to Hiroshima, p. 306.

78 Dr Junod’s report, 24 March 1936, p. 4; see also Junod, Warrior Without Weapons, pp. 51–61; Durand, From Sarajevo to Hiroshima, p. 306.

79 Letter from Max Huber to Senator Cremonesi, President of the Italian Red Cross, 12 April 1936, ICRC Archives, file CR 210-VIII; Durand, From Sarajevo to Hiroshima, pp. 307–8.

80 Letter from Sen. Cremonesi to Max Huber, 11 May 1936, ICRC Archives, file CR 210-IX.

81 Letter from Col. Favre, ICRC Vice-President, to Sen. Cremonesi, 26 May 1936, ICRC Archives, file CR 210-IX.

82 Ibid.; Durand, From Sarajevo to Hiroshima, p. 314.

83 The Committee of Thirteen was a subsidiary organ of the League of Nations Council. It was created by the Council to deal with all questions arising from the war in Ethiopia, and included all the members of the Council except Italy; Ethiopia was neither a member of the Council, nor of the Committee.

84 Letter from the Secretary-General of the League of Nations to Max Huber, 8 April 1936, RICR, no. 208, April 1936, p. 334 [ICRC translation].

85 Letter from the ICRC Vice-President to the Secretary-General of the League of Nations, 9 April 1936, published in RICR, no. 208, April 1936, pp. 334–5; Durand, From Sarajevo to Hiroshima, p. 308.

86 Letter from Salvador de Madariaga to Max Huber, 18 April 1936, RICR, no. 208, April 1936, pp. 335–6; Durand, From Sarajevo to Hiroshima, p. 309.

87 Letter from Max Huber to Salvador de Madariaga, 24 April 1936, RICR, no. 208, April 1936, pp. 337–8; Durand, From Sarajevo to Hiroshima, p. 309.

88 Durand, From Sarajevo to Hiroshima, pp. 309.


91 Ibid., pp. 6–7.

92 Durand, From Sarajevo to Hiroshima, pp. 315–17.

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94 RICR, no. 215, November 1936, pp. 940–2; Durand, From Sarajevo to Hiroshima, pp. 316–17.
96 Letter from Max Huber to Salvador de Madariaga, 24 April 1936, RICR, no. 208, April 1936, p. 337.
98 The floods were themselves a result of the general economic collapse and of the war, which had prevented maintenance work on canals and dikes.
100 Ibid.
101 Ibid.; Durand, From Sarajevo to Hiroshima, p. 372.
102 Durand, From Sarajevo to Hiroshima, p. 372.
104 Dr Louis Calame, ‘La misère dans le nord de la Chine’, RICR, no. 239, November 1938, pp. 967–1016.
107 RICR, no. 228, December 1937, pp. 1193–4; Durand, From Sarajevo to Hiroshima, p. 377.
109 See Chapter IX, Section 7, p. 280.
111 Note from Max Huber to the Foreign Ministers of China and Japan, 5 March 1938, ICRC Archives, file CR 217-III; Durand, From Sarajevo to Hiroshima, p. 382.
112 Durand, From Sarajevo to Hiroshima, p. 382.
113 RICR, no. 233, May 1938, p. 469.
115 Durand, From Sarajevo to Hiroshima, p. 372.

References

The only comprehensive study of the period is by André Durand, History of the International Committee of the Red Cross: From Sarajevo to Hiroshima, Henry Dunant Institute, Geneva, 1984, pp. 222–4, 232–3, 268–74, 293–317 and 369–83. Further references are given in the various sections of this chapter.
CHAPTER VIII

THE SECOND WORLD WAR

La guerre n’est pas une maladie.
C’est un mal insupportable
parce qu’il vient aux hommes
par les hommes.
Jean-Paul Sartre,
Le Sursis, p. 205.

I have nothing to offer but blood, toil,
tears and sweat.
Winston Churchill,
13 May 1940

1. Introduction

Since 1931, world peace had been threatened by a policy of intimidation
and armed aggression which was inevitably to lead to a new generalized
conflict.

Following the ‘Manchurian Incident’, the conflict in Ethiopia, the Spanish
Civil War, the invasion of China, the annexation of Austria and the dismem-
bering of Czechoslovakia, the Second World War was finally provoked by
Germany’s attack on Poland.

Beginning as a new European war, the conflict spread like a forest fire,
engulfing nation after nation, leaping oceans and searing its way across conti-
nents; it ultimately became a struggle for world domination.

At the outset, the Second World War looked like a repeat of the First: once
again Germany, drawing in its wake the countries of the Danube basin, set
out on a quest for supremacy and challenged the rest of the world. Italy and
Japan had changed sides, but this was to satisfy ambitions which had been
left unquenched by their share in the victory of 1918.

But the conflict soon assumed much greater proportions: while the
1914–18 war had remained essentially European in scope, that of 1939–45
was a world war in every sense. Although the decisive battles were fought in
Europe, from the Pyrenees to the Urals, the campaigning armies also left a
trail of devastation through North and East Africa, Asia – from Japan to the
borders of India – and the Pacific islands. The countries taking an active part
in the war accounted for more than two-thirds of the earth’s total popula-
tion. Only Latin America, West Africa, the Arabian peninsula, Afghanistan
and five neutral European countries were spared. Throughout the belligerent
states the mobilization – of men and material resources – reached levels never
seen before: Germany had more than twelve million men under arms, the
Soviet Union more than twenty million.

National economies were drained by the war effort. While scientists con-
tinually sought to make existing weapons more powerful or invent new ones,
all the resources of industry went into building up an immense strike capac-
ity. Science and technology were pressed into the service of the war. On land,
tanks and long-range artillery dominated the battlefield; in the skies, bomber
aircraft enabled a commander to strike at enemy territory hundreds of miles
behind the lines; at sea, the aircraft carrier and the submarine outclassed the
battleship as a means of combat. Finally, with the atomic bomb, mankind
acquired almost unlimited destructive power.

The growth of the armed forces and the terrifying power of the new mass-
produced means of destruction made possible by industrial development led
to an unprecedented loss of life. Although reliable figures are lacking for
some countries, there is no doubt that there were more than fifty million
direct victims of the war – dead and missing – with millions more wounded
and disabled. The length of the conflict and the uncertainties of the post-war
period meant long years of captivity for millions of prisoners.

For the first time in modern history, the number of civilian casualties
equalled, or even surpassed, the number of servicemen killed or wounded.
This heavy civilian toll was primarily due to air raids intended to break the
enemy’s resistance by destroying his industrial potential or by sowing panic
among the population. Germany took the lead by bombing Warsaw,
Rotterdam, London, Coventry and other cities, but the Allies were soon in a
position to pay back – with dividend. The main cities and towns of Germany
and Japan were bombed repeatedly by formations of more than a thousand
aircraft; whole districts were flattened in a single raid. The attacks culmi-
nated in the atomic explosions which wiped out Hiroshima and Nagasaki.

The victorious German army conquered most of Europe, from the Atlantic
to the Volga. The territories it occupied, in particular those of eastern
Europe, were subjected to a regime of brutality and oppression. The inhabit-
ants’ initial passive resistance soon took the form of increasingly efficient
guerrilla warfare, especially in Poland, Yugoslavia and the USSR. The occu-
pying forces responded to the resistance movements’ attacks and acts of sabo-
tage by taking ever harsher reprisals against the civilian population. The same
happened in the countries occupied by Japan, notably in China, where resist-
ance was particularly fierce. Occupation thus gave rise to new forms of strug-
gle which ignored the distinction between combatants and non-combatants,
with dire consequences for the civilian population.

Nazi Germany turned the conflict into an ideological crusade, which
reached its nadir after the invasion of Russia, where untrammelled fanati-
cism swept aside both law and moral values. The science and technology of
the twentieth century were used to support a war of medieval barbarity in
which issues were reduced to the crudest terms, giving free rein to violence
and justifying the most heinous crimes.
Finally, in a descent to the depths of human depravity, Hitler’s perverted beliefs transformed the conflict into a racial war, inspired by a pathological and monstrous conception of society which led to the enslavement of so-called inferior races and to the annihilation of the people it regarded as evil personified – the Jews. Without the slightest pretext of military necessity, millions of human beings were massacred in the execution of a methodical and concerted plan reflecting the demonic obsessions of the masters of the Third Reich.

The physical destruction was enormous, wiping out industry, transport, homes, agricultural machinery and equipment, crops and stocks of food and raw materials, bringing with it the deadly consequences of war: deprivation, famine, disease.

The moral contamination was just as serious. In every occupied country there were individuals who sided with the invader, acting out of conviction or simple opportunism; collaboration led to tragic rifts in the population, blood feuds and, after liberation, merciless retribution. But above all, Nazi rule was marked by a complete inversion of moral values which culminated in the mass graves, concentration camps and crematoria brought to light after the Nazis’ defeat. Brutality, contempt and hatred were held up as ideals, leading to criminal acts whose traumatic effects have not been cured by the punishment of those who had ordered them.

The cataclysm of the Second World War was unprecedented in terms of the loss of human life, physical destruction and moral decline. Never before had war led to such mourning, agony and devastation; never before had the nihilistic distortion of human values led to such inhumanity.

Faced with this explosion of violence, what could the International Committee possibly do? What legal support did it have on which to base its work?

2. The legal framework

What were the legal relations between the main belligerents during the Second World War?

Wounded and sick soldiers were protected by the relevant 1929 Geneva Convention, to which almost every country was party. As the general participation clause (‘clausula si omnes’) which had impaired its forerunner of 1906 had been removed by the 1929 Diplomatic Conference, the binding force of the Convention could no longer be questioned.

However, under Article 2 thereof, wounded and sick soldiers captured by the enemy had to be considered and treated as prisoners of war, except as regards the medical treatment to which they were entitled. The Convention thus drew for support on the law applicable to prisoners of war and referred specifically to its provisions.

This law had been thoroughly revised to take into account the lessons learnt from the First World War. The 1929 Convention relative to the
Treatment of Prisoners of War (also known as the Prisoners-of-War Code) protected the latter through a precise and detailed set of rules, and gave the ICRC a legal basis for its work. But for the Convention to take full effect, all states concerned had to be party to it – and two of the principal belligerents, the Soviet Union and Japan, were not. The seriousness of their defection cannot be overstated: since a treaty applies only between the contracting parties, all the countries at war with the USSR or Japan were therefore free of any obligations, under the Prisoners-of-War Code, towards these two countries. As a result, the Convention was in force only between the Allies and Germany and Italy. On Europe’s Eastern Front and in the Far East, the belligerents were not bound by it.

This did not mean, however, that the warring nations were freed of all obligations towards prisoners of war. Articles 4 to 20 of the 1907 Hague Regulations and the provisions of customary law remained in force. Unfortunately, the First World War had shown that the Hague Regulations were too imprecise, while customary law left such latitude to those who took prisoners that it was of little real use. In practice, then, whenever the 1929 Convention on prisoners of war was not in force, they could not expect sufficient protection from either customary law or the Hague Regulations.

With regard to civilians, the legal position was just as the 1907 Hague Conference had left it.

Despite the International Committee’s efforts the Draft International Convention concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in Territory occupied by it, which had been adopted by the Fifteenth International Conference of the Red Cross held in Tokyo in 1934, had not been approved by a diplomatic conference. The Tokyo Draft, as it was known, was therefore not binding on the belligerents; the protection of the civilian population in occupied territories was ensured only by Articles 42 to 56 of the Hague Regulations, which the 1914–18 war had shown to be inadequate.

The protection of civilians from the effects of bombing was no better. The ICRC’s efforts to promote the creation of hospital or safety zones had as yet produced nothing more than draft texts. Aerial warfare was restricted only by Articles 25 and 27 of the Hague Regulations, as well as by Declaration XIV of the 1907 Hague Conference, which banned the dropping of ‘projectiles and explosives from balloons…’. So although the Spanish Civil War and the Sino-Japanese conflict had shown the fearsome power of aerial bombardment and the extreme vulnerability of the civilian population, international law in this field had not progressed beyond the era of the airship.

3. The Committee’s delegations

The position of the ICRC in September 1939 bore no resemblance to that of August 1914.
For one thing, the 1929 Convention gave the ICRC certain powers – and certain responsibilities – for the protection of prisoners of war. Those provisions were to be the cornerstone of the Committee’s work throughout the war.

Another major difference was that the ICRC could work according to a known *modus operandi*. Whereas in the autumn of 1914 it had had to improvise its operational structure to meet the needs of a European war, in 1939 it could base its work on methods that had been tried and tested, and whose principle components were the Central Agency for Prisoners of War, visits to places of detention, and relief operations. Many of the Committee’s members, having supervised the International Prisoners-of-War Agency during the First World War, were well versed in the operational routine. This changed little during World War II, except that, in the light of its work during the hostilities in Ethiopia and Spain, the ICRC decided from the start to conduct its operations through permanent delegations rather than temporary special missions. And of course, like the war itself, the scale of these operations was to be entirely different.

Furthermore, unlike August 1914, the ICRC was not caught unprepared in 1939: there had been enough warnings of the imminent catastrophe. On 10 September 1938, at the height of the Sudetenland crisis, the Committee had formed a special commission – *La Commission des Oeuvres de Guerre* (Commission for Work in Time of War) – with the task of preparing for the ICRC’s activities in the event of a generalized conflict.

The Commission had drawn up a plan of action and had sought to define the ICRC’s position and policy on several particularly sensitive issues. It had also made numerous practical arrangements to enable the ICRC to assume its responsibilities as soon as hostilities broke out: premises large enough for the Central Agency for Prisoners of War had been secured, the necessary office equipment had been hired, and former staff who might be willing to resume work for the ICRC, either in Geneva or in the field, had been contacted and were standing by.

So when the German army invaded Poland on 1 September 1939, the ICRC was as well prepared as it could be to cope with a phenomenon as unpredictable as war.

The following day, it sent offers of services by telegram to the belligerent states: Germany, Poland, France and Britain. These messages were immediately confirmed by a letter in which the ICRC outlined what it proposed to do ‘in order to help, according to its traditional role and with all its strength, to remedy the evils engendered by war’.

The ICRC wished to take action:

- in aid of medical personnel;
- in aid of prisoners of war, both civilian and military, in particular by the opening of a Central Information Agency, by exchanging the seriously wounded and sick, by transmitting correspondence and by co-ordinating private relief operations;
in aid of the civilian population by creating safety zones.

It also called for urgent measures:

• to establish national information bureaux;
• to grant special protective status to foreign nationals in enemy, or enemy-controlled, territory.

In closing, the ICRC said it would ‘devote all its energy to the task before it, experience having shown how useful it was, in grave circumstances such as those of today, to ensure prompt action by a neutral and strictly impartial body, faithfully upholding the humanitarian cause of the Red Cross’.14

In the days that followed, it published various documents on the protection of civilians, the creation of hospital and safety zones, and the attitude it would adopt with regard to violations of international humanitarian law.15 It also took practical steps to set up the Central Agency for Prisoners of War, and announced its opening on 14 September.16

On 7 September the ICRC informed the countries at war that it proposed sending delegates who, with the governments and Red Cross Societies concerned, would work out ‘the most rapid and effective means of ensuring the humanitarian work of the International Committee’.17

The following delegates were appointed: Dr Marcel Junod (assigned to Germany), Edouard Frick (France), Rodolphe Haccius (Britain) and Robert Brunel (Poland); all four had already carried out several missions for the Committee.18

But while three of them had taken up their posts by mid-September, Brunel was prevented from reaching Warsaw by the speed of the German offensive. Forced to remain at Bucharest, he organized assistance for the Polish military and civilian refugees flooding into Romania and Hungary.19

The spread of hostilities and the capture of millions of prisoners of war impelled the International Committee to increase the number of delegations, especially in Germany, where there were eventually forty delegates,20 and to open new delegations in countries that had been swept into the war. And as each new declaration of war resulted in the internment of countless enemy civilians, the ICRC had to open delegations in countries which were far removed from the hostilities and which took no part in military operations.21 It also set up delegations in neutral countries – Portugal, Spain, Sweden and Turkey – to forward mail and to act as transit points for the shipment of relief.22

By the end of the war, the ICRC was represented by 179 delegates in 76 permanent delegations, assisted by hundreds of locally recruited employees.23

In addition, special missions were carried out from Geneva to conduct particularly sensitive and important negotiations; no less than 194 such missions were made between September 1939 and June 1947.24

All this activity did not mean that the ICRC’s coverage of the belligerent countries was all that it wished. The growth of the delegation network was
hampered by various problems, the disruption of transport being just one, and by no means the most serious.

The Nazi authorities imposed a limit on the number of staff at the Berlin delegation, keeping it far below what was needed to cover the territories occupied by the Third Reich and the number of military and civilian prisoners being held.\textsuperscript{25} Despite repeated requests, it proved impossible throughout the entire German occupation of Poland and the Netherlands to open delegations there.\textsuperscript{26} Every attempt at opening a delegation in Moscow, or even arranging a visit to the USSR to meet the Soviet authorities, was likewise turned down.\textsuperscript{27}

In the Far East, meanwhile, the appointment of delegates proved extremely difficult. So as to avoid the delays involved in sending delegates from Geneva, the ICRC appointed Swiss nationals resident in the Far East as its representatives. Japan agreed to recognize delegates based in Japan itself, in Shanghai and in Hong Kong, but refused the accreditation of delegates for the Philippines, the Dutch East Indies, Siam, Singapore and Borneo.\textsuperscript{28} With no official status, the delegates there could act only in a private capacity and in very hazardous conditions; deprived as they were of contact with Geneva and facing incomprehension and all kinds of harassment and obstacles, their work for the victims was limited and carried out at great personal risk. Two of them, Dr Matthaeus Vischer and his wife, stationed in Borneo, were accused of spying after trying to assist prisoners of war. Following a mock trial, they were condemned to death by a Japanese naval court and executed.\textsuperscript{29}

When certain warring countries were split up by the course of hostilities, the Committee had to open several delegations so as to be represented with each administration exercising \textit{de facto} authority over part of the territory, and to have access to the prisoners held there. This was the case in Yugoslavia and Czechoslovakia, as well as in Italy after the armistice of September 1943.\textsuperscript{30} The ICRC also opened sub-delegations when the bombing and disrupted means of communication made travel impossible. Similarly, after the German surrender, it had to adapt its operational set-up in Germany and Austria to the division of these countries into occupation zones.\textsuperscript{31}

The ICRC had delegations in the following countries and territories:

**EUROPE:**
- Germany (Berlin, Lübeck, Frankfurt-am-Main, Munich, Bayreuth, Vlotho, Baden-Baden, Freiburg-im-Breisgau, Bad Kreuznach; Britain (London); France (Paris, Lyon, Marseilles, Toulon); Belgium (Brussels); Italy (Rome, Milan, Florence, Verona, Genoa, Turin, Naples, Palermo); Yugoslavia (Belgrade); ‘Croatia’ (Zagreb); Greece (Athens, Salonika, Larissa, Corfu, Rhodes); Romania (Bucharest); Hungary (Budapest); Bulgaria (Sofia); the ‘Bohemia-Moravia Protectorate’ (Prague); ‘Slovakia’ (Bratislava); Austria (Vienna, Salzburg,
Bregenz, Bad Gastein, Innsbruck, Linz, Klagenfurt; Holland (The Hague); Norway (Oslo); Denmark (Copenhagen); Finland (Helsinki); Poland (Warsaw); Portugal (Lisbon); Spain (San Sebastian); Sweden (Stockholm, Göteborg); Switzerland (Berne).

NEAR EAST: Turkey (Ankara); Syria and Lebanon (Beirut).

AFRICA: Egypt (Cairo); Ethiopia (Addis Ababa); Italian Somalia (Mogadishu); Kenya (Nairobi); French Equatorial Africa (Brazzaville); Rhodesia (Salisbury); Union of South Africa (Pretoria); North Africa (Algiers, Oran, Tunis, Tangier); Gold Coast (Accra); Madagascar (Tananarive).

ASIA: India (Delhi); Ceylon (Colombo); Japan and Japanese-occupied territories (Tokyo, Shanghai, Hong Kong, Singapore, Manila, Batavia); Siam (Bangkok); China (Chungking).

THE AMERICAS: United States (Washington); Canada (Ottawa); Argentina (Buenos Aires); Brazil (Rio de Janeiro); Suriname (Paramaribo); Haiti (Port-au-Prince); Jamaica (Kingston); Venezuela (Caracas); Colombia (Bogota); Mexico (Mexico City); Uruguay (Montevideo); Bolivia (La Paz); Cuba (Havana).

OCEANIA: Australia (Sydney); New Zealand (Wellington).

To meet its commitments, the International Committee thus established a network of delegations covering most of the world. While some missions were staffed by just one delegate, others had several, assisted by dozens of local staff. Because of the large number of prisoners held within the borders of the Reich, the Berlin delegation remained the largest until hostilities ended.

Despite the huge problems encountered in travelling, the ICRC delegates covered more than 16 million kilometres (roughly 10 million miles) by air, sea, rail and road, a distance equal to more than 400 times round the world. Eleven of them lost their lives while on mission.

These were the ICRC’s ‘front-line troops’. By the spring of 1945, the staff at headquarters in Geneva reached their peak number of 3921, of whom 2585 were employed by the Central Agency for Prisoners of War.

The ICRC’s main activities will be discussed in the following sections.

As shown above, there was a great disparity in the legal relationships between the main belligerents and wide variations in the status of the victims, according to whether they were soldiers or civilians and the theatre of war they were in. Whatever its own wishes, those relationships determined the ICRC’s scope for action: what it could or could not do depended, as it does now, on the legal status of the people it was trying to help.
The Committee’s activities therefore have to be viewed in relation to the status of the victims, who may be grouped as follows:

- wounded or sick soldiers;
- prisoners of war (and here a distinction must be made between those who were protected by the 1929 Convention and those who were not);
- civilians.

4. The protection of wounded and sick servicemen

Medical assistance on the battlefield was essentially the responsibility of the armed forces’ medical services and the National Red Cross Societies. As in the First World War, the International Committee was not called upon to help.36

This does not imply that the ICRC was indifferent as to whether the Geneva Convention was implemented. Indeed, it had to intervene to facilitate the shipment of essential medical supplies to countries under naval blockade. Through negotiations with the British authorities – the Ministry of Economic Warfare – it managed to obtain transit permits for dressings and pharmaceutical products, which were thus exempted from the embargo.37

The situation of medical personnel, whether military or belonging to the National Societies, was also a constant source of concern. The 1929 Geneva Convention, like its forerunners of 1864 and 1906, had stipulated that medical personnel may not be held as prisoners of war, but must be sent back to their own country ‘as soon as a route for their return shall be open and military considerations permit’.38 However, the Convention on prisoners of war, in line with general practice during World War I, allowed belligerents to reach special agreements ‘to retain in the camps doctors and medical orderlies for the purpose of caring for their prisoner compatriots’.39 As it turned out, the belligerents made great use of this clause and reached agreements concerning the percentage of doctors, dentists, nurses, orderlies and chaplains to be retained in relation to the total number of prisoners of war in their hands.40

The ICRC felt unable to protest against measures which ‘the Powers considered necessary in the interest of PW’;41 however, it tried to help medical personnel in three ways:

a) It sought to provide members of the medical services with proof of their profession and thus enable them to claim their rightful status. Many doctors, nurses and orderlies had lost their identity cards during the fighting or had been deprived of them when captured. The Agency undertook to obtain and transmit thousands of certificates which enabled medical personnel to be recognized as such, and to claim the treatment to
which they were entitled under the Geneva Convention. Tracing these documents was particularly difficult in cases where a prisoner’s country of origin had temporarily ceased to exist.\textsuperscript{42}

b) While refraining from comment on the agreements reached by the belligerents on retaining some medical personnel, the ICRC often stepped in to try to improve their conditions of detention, and especially to ensure that doctors, nurses, orderlies and chaplains who were held back in order to care for their fellow prisoners were allowed sufficient freedom to do so. It intervened each time its delegates reported that medical staff were being kept idle or even assigned to unrelated work.\textsuperscript{43}

c) Finally, the ICRC made continuous efforts to secure the release of medical staff who were not needed to look after their captive compatriots. Despite considerable problems due to the complete disruption of communications and transport, a number of repatriations were arranged during the war, involving the return of several thousand doctors, nurses and orderlies.\textsuperscript{44}

Contrary to its practice during the wars in Ethiopia and Spain, the International Committee was not requested to notify the location of field medical units to the respective opponents; no doubt the speed and extent of military operations made this step useless. However, in November 1944 the French provisional government asked the ICRC to notify the German authorities that it had put the hospital ship \textit{Canada} into service. Usually, such notifications were made through the Protecting Powers; but as there were no such intermediaries between France and Germany, the Committee agreed to this request.\textsuperscript{45}

The ICRC was also approached on numerous occasions with complaints about the bombing of medical units or hospital ships. Following its usual practice, it passed on these allegations to the National Society of the accused country, but did not make them public.\textsuperscript{46}

5. Prisoners of war

The tremendous size of the armies, the scale on which they were deployed and their lightning offensives, in which whole countries were swiftly overrun, led to the capture of huge numbers of prisoners of war: more than 600,000 Poles in September 1939; 1.6 million French in May and June 1940; several million Russians and Germans on the Eastern Front; and in May 1945, the whole German army, taken prisoner after surrendering. A similar fate awaited the Japanese army in September 1945.

It was a situation without precedent: prisoners were transported to places as far apart as Canada and New Zealand, Scotland and South Africa. In Europe and North America the main POW camps were veritable towns, with tens of thousands of inmates. Millions of men entered captivity and, for the most part, remained prisoners for years. What would become of them?
The Geneva Convention of 27 July 1929 had been adopted with the purpose of giving a captured soldier clearly defined and detailed legal protection; the need for this had been shown all too clearly during the First World War. Two of the main belligerent powers, however – Japan and the Soviet Union – were not party to the Convention. Other governments asserted that because of the circumstances in which certain groups of prisoners had fallen into their hands, they were not entitled to the protection of the Convention.

Thus the circumstances of capture resulted in inequalities of status which inevitably affected the work of the International Committee, for its ability to take action was influenced by the presence, or absence, of a treaty whose provisions could be invoked vis-à-vis the detaining power. A distinction must therefore be made between the following categories of prisoners:

a) prisoners protected by the Geneva Convention;
b) prisoners captured on the Eastern Front;
c) prisoners captured in the Far East;
d) combatants who were denied prisoner-of-war status.

These categories were not decided by the ICRC. They were a result of the differing legal provisions applied to the prisoners and therefore were ultimately determined by the attitude of the belligerents themselves.

Prisoners protected by the Geneva Convention

The 1929 Geneva Convention on prisoners of war was remarkable in two ways: it gave prisoners a clearly defined status enabling them to claim the corresponding treatment from the detaining power, and it entrusted a third party – the Protecting Power – with the task of ensuring that this status was duly respected. Furthermore, the Convention acknowledged the International Committee’s competence in matters relating to their protection.

Strictly speaking, however, the Convention gave the ICRC only the right to propose the opening of a central agency of information regarding prisoners of war (Article 79), and to offer its services for the protection of prisoners. Article 88 states:

The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may perform for the protection of prisoners of war with the consent of the belligerents concerned.

Although the scope of these provisions was limited, since anything the ICRC proposed remained subject to the warring parties’ approval, they nonetheless clearly gave the Committee the right to take an interest in the situation of prisoners and to make proposals, comments and suggestions with a view to improving their conditions of detention.

This was the basis on which most of the ICRC’s work had to be conducted. The resulting activities will be examined in the following pages.
In September 1939 the Committee opened the Central Prisoners-of-War Agency in Geneva, to perform three main tasks:

- to centralize all information on prisoners of war (notification of capture, transfer, death, etc.);
- to act as an intermediary between the belligerents for the transmission of such information;
- to reply, on the basis of the data assembled in its card-indexes or of research carried out, to requests from public or private organizations and from private persons, and in general try to restore contact between the prisoners and their families.

The Agency’s activities were essentially the same as those it had carried out during the First World War: transmitting lists of prisoners, creating card-indexes containing all available information on prisoners of war, establishing a message system to maintain contact between prisoners and their families, forwarding documents and official papers, making enquiries, and so on. These activities have already been described above; the guiding principles of such work had changed little in the intervening twenty years. Certain points, however, distinguished the 1939 Agency from its predecessors and merit examination here.

During the First World War, there had been some notable exceptions to the established principle of centralizing information on prisoners of war. The International Committee had asked the Danish Red Cross to open an agency in Copenhagen to gather information on prisoners captured on the Eastern Front; the National Societies of Austria and Italy had exchanged information directly on prisoners taken during the fighting on the Austro-Italian front. This procedure was abandoned during World War II. The Agency sought to centralize data on all prisoners of war and on all servicemen interned in neutral countries; it opened card-indexes for each nation at war, with the exception of China and Ethiopia, for which it did not receive the necessary information. It did envisage opening an office at Ankara, but only as a forwarding agency to help in the transmission of mail and lists of names of prisoners of war between the USSR and the Axis countries. The Geneva Agency was therefore open to all countries, whether belligerent or neutral; it was unique and its scope universal.

From the autumn of 1939, the ICRC urged the belligerents to make systematic use of ‘capture cards’, to be filled in by the prisoners themselves when they arrived in a camp. This would help overcome the inevitable delays which resulted from establishing the official lists provided for in Article 77 of the Prisoners-of-War Code. And as the cards would be filled in by the prisoners themselves, the risk of error would be far less than in lists compiled by officials of the detaining power. Moreover, the capture cards could be inserted directly into the Agency’s card-indexes. The systematic use of these cards as a supplementary source of information was one of the most important innovations introduced by the 1939 Agency.
The Central Agency made great use of the latest methods of data-processing and transmission, such as telegraphy, radio and microfilm. Thanks to the generosity of IBM President Thomas J. Watson, the Agency had the free use of a large number of office machines which opened up new possibilities, especially for regimental enquiries. Following the battle for France, these machines enabled the Agency to send letters to 570,000 French prisoners of war, asking them for news of missing comrades; 170,000 positive replies were received, giving details of where and how more than 30,000 soldiers had died. The number of missing whose fate was unknown was thereby reduced from 40,000 to 10,000 men. An enquiry of this magnitude could never have been carried out without the help of those forerunners of today’s computers.

The Agency’s activities grew phenomenally, as evidenced by the volume of its card-indexes: at the close of the 1914–18 war those of the International Prisoners of War Agency contained some seven million cards, whereas the Central Agency had a total of 36 million at the end of June 1947.

The First World War had shown that legal rules to protect prisoners were of little practical use without third-party supervision. This omission was corrected by the 1929 Diplomatic Conference, which assigned the responsibility for supervision to the Protecting Powers: under Article 86 of the Geneva Convention on prisoners of war, representatives of these Powers were authorized to visit any place where prisoners were being held; they could enter all premises used by prisoners and could speak to them, as a general rule in private. However, the Conference did not wish to limit the ICRC’s own work, and confirmed the Committee’s right of initiative in Article 88.

This right of initiative was used by the ICRC as the basis for requesting permission – which it did soon after the conflict started – to visit prisoners of war. The first visits took place three weeks after fighting began: from 23 to 26 September Dr Junod, stationed in Berlin, visited camps holding Polish prisoners of war at Itzehoe, Bromberg and Hammerstein. Over the next few months, other visits took place in Germany, Britain and France.

After the battle for France, the capture of two million prisoners of war by the Germans led the ICRC to introduce a major change in its visits to camps. Realizing that occasional visits, carried out during special missions, did not give a full idea of the prisoners’ conditions of detention, it recognized the need to have all camps visited by its delegates at regular intervals. This soon became the rule, to such an extent that the ICRC stopped sending in special missions, as it had done during the early months of the conflict, and thereafter based its operations on permanent delegations in the countries at war.

These regular visits in no way duplicated those made by officials of the Protecting Powers. While the activities of each were in many ways similar, their aims were different. The Protecting Power acts on behalf of the state whose citizens and interests it is looking after; it accepts that country’s mandate and must follow its instructions. The ICRC, on the other hand, is nobody’s agent; it acts on its own initiative, working in the name of its
humanitarian principles and on behalf of all prisoners. Often it alone has access to prisoners on both sides, allowing it to have an overall view of prison conditions and thus to advance the argument of mutual interest. Moreover, the ICRC can sometimes act on behalf of prisoners who do not—or who no longer—benefit from the work of the Protecting Powers.\textsuperscript{57} So when, for instance, the armistice of 22 June 1940 ended the mandate of the Protecting Power taking care of French interests, the ICRC was able to continue its work in aid of French prisoners of war held in Germany.\textsuperscript{58}

The aims of the ICRC’s visits to places of detention were explained in its \textit{Report}:

The inspection of camps enabled the ICRC to know and to keep a check on the treatment of PW and the application of the terms of the Convention; to give impartial and objective information to the Powers concerned; to improve the conditions of PW by steps taken on the spot, or by intervention made from Geneva; to realize their needs and to direct measures of relief; and finally, to verify the distribution of relief parcels.\textsuperscript{59}

The visits followed the procedure laid down during the First World War. After an initial interview with the camp commandant, the delegates visited all buildings and installations used by the prisoners: dormitories, refectories, kitchens, food stores, canteens, hygiene and sanitary facilities, sick bays, punishment cells, workshops, warehouses, exercise yards, and so on. Through private discussions with the prisoners, and in particular their elected representative, the chaplain and the chief medical officer, the delegates built up a complete picture of conditions in the camp and the prisoners’ daily life. At the end they had a further meeting with the camp commandant, to seek clarification on any point and to comment on the visit.\textsuperscript{60}

After each visit a detailed report was written. This set out to describe, as precisely and as objectively as possible, the conditions of detention, any complaints by the prisoners, and the outcome of the discussions with the prisoners’ representative and the camp commandant. Contrary to First World War practice, the reports were not published but were sent, in an identical form, to the governments of both the detaining power and the prisoners’ country of origin.\textsuperscript{61}

Finally, representations were made after each visit to try to improve the conditions of detention. According to the seriousness of the problems encountered, steps were taken either by the delegation concerned or by the ICRC in Geneva; approaches might be made to the camp commandant, to various levels of the administration or to the highest authorities in the land. There is no need here to go into the many approaches that were made; they touched on every aspect of the lives of millions of prisoners, from minor questions such as the number of cigarettes or changes of underwear they were allowed, to major violations of the Convention itself, such as forcing prisoners of war to work in support of the war effort, or taking reprisals against them.\textsuperscript{62}
From 1 September 1939 to 31 December 1948 ICRC delegates carried out more than 12,750 visits to places of internment. This unprecedented achievement is without any doubt the most significant and the most important aspect of the International Committee’s work during the Second World War. The visits conditioned all the ICRC’s other activities for prisoners, in particular the supply of relief.

The 1929 Convention made the detaining power responsible for the upkeep of prisoners of war and obliged it to provide all vital necessities: shelter, clothing, food, medical care, and so on. From a material point of view, prisoners of war were to be treated in the same way as troops of the detaining power who were stationed in barracks. It was reasonable, therefore, to assume that the need for outside assistance would remain exceptional.

In practice, things turned out quite differently. Whether from a lack of determination to apply the rules, or because of the economic war – whose effects were felt almost from the start of the conflict and became gradually worse as time went on – it was soon clear that the Axis powers were unable to look after the millions of prisoners they had taken.

This put the question of upkeep in an entirely different light: in order to ensure the prisoners’ survival and to maintain their health, large-scale assistance was needed. However, this was hindered precisely by the economic warfare which made it indispensable. By means of a naval blockade or submarine attacks, each side tried to isolate the other and cut off its supplies. All trade with the enemy was banned, and even shipments to neutral countries were subject to strict quotas and close supervision.

In view of the serious shortages everywhere in Europe – including the neutral countries – food for prisoners had to be brought from overseas. But although the British government was concerned about the situation of Allied prisoners of war and recognized the need for external relief efforts, it was not prepared to relax the blockade. The ICRC therefore opened negotiations with the Ministry of Economic Warfare in London which were continued throughout the war. On 29 August 1940, London agreed in principle to the sending of collective relief consignments for prisoners of war, but only on condition that their distribution was strictly supervised to ensure that supplies sent to Europe under this special dispensation could not be used to help the enemy’s war effort. Furthermore, an individual permit had to be requested for each consignment.

This outline agreement was never called into question. But the ICRC constantly tried to expand the categories of prisoners receiving the relief supplies, whereas the authorities responsible for enforcing the blockade sought to restrict them to clearly defined groups, so as to reduce the risk of misuse. The Ministry of Economic Warfare also made the issuing of permits conditional on ICRC visits to the prisoners concerned, while the ICRC maintained that relief consignments should not be made dependent on visits which might be compromised by the fortunes of war.
On the basis of its agreements with the belligerents, the ICRC was able to carry out two kinds of relief operation:

- those which it undertook using its own funds and whose procedure and beneficiaries it was able, within the terms of the agreements with the blockading authorities, to determine itself; as the ICRC’s own resources were pitifully small, so too were these operations;
- those in which it acted as an agent: the supplies were entrusted to the ICRC which then forwarded them and ensured their distribution to the beneficiaries specified by the donor; because of the huge amounts of relief sent by the National Societies of the Allied countries, in particular those of the United States, Britain and Canada, operations of this kind grew to gigantic proportions.

To reach an agreement with the authorities enforcing the blockade was only the first hurdle to be overcome: there remained the enormous practical difficulties resulting from the disruption of transport and the problem of making the necessary logistical arrangements on a scale hitherto unknown.

To get the relief supplies to the prisoners, the ICRC had to charter – and later purchase – a number of ocean-going ships, which sailed under the red cross emblem. Before each voyage safe conduct had to be obtained. Warehouses had to be set up at each stage of the hazardous journey from the prisoners’ home countries to the camps; the main ones were at Lisbon, Marseilles, Göteborg, Lübeck, Geneva and Moosburg. From Switzerland, relief was sent to Germany in sealed railway wagons and later, after the destruction of the German rail network, by convoys of trucks. The procedure had to be completed by scrupulous checking of the receipt forms signed by the prisoners’ representatives, as well as checks made by ICRC delegates during their visits so as to make sure the supplies were not being diverted. Only in this way could the Committee provide donors with the assurances essential for the continuation of the relief programme.

During the final months of the war the complete breakdown of the transport system in Germany and the mingling of prisoners of every nationality made orderly relief distributions, allocated in accordance with the donors’ wishes, impossible to continue – just at a time when the need for relief was more urgent than ever. The Committee then proposed pooling all its remaining stocks. This was accepted by the main donors, allowing the ICRC at last to supply any prisoners, regardless of status or nationality, that its relief convoys encountered along the roads or in the camps.

Every month the ICRC managed to provide four standard relief parcels, weighing five kilograms, to each prisoner of war from the United States or the British Empire, and one or two such parcels a month to prisoners of other nations (Poland, France, Belgium, Luxembourg, Holland, Yugoslavia, Greece, etc.). This amounted to the equivalent of about two thousand railway wagons a month – 430,000 tonnes of relief for the whole war, equal to ninety million individual parcels. The ICRC’s Relief Division thus
became, for the duration of the conflict, the largest private shipping concern in Europe.\footnote{75}

Mention should also be made of the provision of numerous items which, while hard to quantify, meant a great deal to the prisoners: medicines, surgical instruments, artificial limbs, spectacles, books in virtually every language, scientific manuals, prayer books, items for religious services, musical instruments and scores, games, and so forth.\footnote{76}

These were remarkable achievements, which transformed the lives in captivity of millions of prisoners of war. It must nonetheless be borne in mind that, owing to its own lack of resources and the rules imposed by the belligerents, the ICRC’s relief operations were subject to constraints which persisted until the final weeks of the war: it was not allowed to decide on the beneficiaries of its assistance and was unable to provide relief to camps which its delegates were not authorized to visit.

Under Article 68 of the 1929 Convention, the detaining power was required to send seriously ill or seriously wounded prisoners of war back to their own country, regardless of rank or numbers. This rule confirmed what had been the usual practice in previous conflicts, in particular the First World War. It was hoped, therefore, that there would be no difficulty in applying it.

That was not the case. Whereas Germany did unilaterally repatriate numerous sick and wounded from countries it had occupied, such as Poland, France, Yugoslavia and Greece,\footnote{77} exchanges with Britain and its allies came up against serious problems and were long delayed. Two of these deserve mention.

Until 1943, the number of prisoners eligible for repatriation was far higher in the Axis countries than in the Allied nations. The Reich tried to exploit this imbalance, either by linking the release of sick and wounded prisoners of war to other measures, such as the repatriation of German civilians, or by demanding an exchange on a \textit{per capita} basis – a measure categorically rejected by the British. The first exchanges were therefore restricted to Italian prisoners of war held by British forces and vice versa, while in Germany and Britain thousands of invalids remained unjustifiably detained. But from 1943, successive Allied victories tended to even out the numbers, putting an end to Germany’s demands.\footnote{78}

Another serious problem was the breakdown of all channels of communication. Whereas a great many sick and wounded prisoners had been repatriated during the First World War via Switzerland, Denmark or the Netherlands, the first of these was now completely surrounded by Axis powers, while the other two had been occupied since April and May 1940. Since there was no longer any neutral overland route between the opposing sides, the only solution until the liberation of France was for the exchanges to take place at a neutral port, to which the prisoners could be brought by ship. But because of the war at sea, operations of this kind were extremely difficult to prepare and carry out.
However, eight exchanges did take place, at Smyrna (Izmir), Lisbon, Barcelona and Göteborg. Towards the end of the war, two more repatriations were effected via Switzerland.

The International Committee’s role in these operations is noteworthy in three respects:

a) Article 69 of the Geneva Convention called for the creation, in each belligerent country, of a mixed medical commission responsible for examining sick or wounded prisoners and deciding whether they should be repatriated. These commissions were to be composed of three doctors, one appointed by the detaining power and two belonging to a neutral country. But the Convention did not stipulate how the neutral doctors should be appointed; in the event, the belligerents asked the Committee to designate them. The ICRC also helped the commissions in their work, in particular in establishing standard criteria without which the repatriations might have been suspended.

b) Although the diplomatic negotiations for the repatriations were generally conducted by the Protecting Powers, the ninth operation, in which French and German invalids were repatriated via Switzerland on 1 November 1944, was organized exclusively by the ICRC, since no Protecting Power had been appointed to look after the interests of the provisional French government in Germany and German interests in recently liberated France.

c) Lastly, for each operation the governments concerned asked the ICRC to send delegates with the convoys to check the lists of persons being repatriated, to make sure that all prisoners who were named on the list were indeed in the convoy and were duly released, to look after the sick and wounded during the journey and to act as intermediaries between officials of both sides, so as to ensure that things ran smoothly.

In these ten operations, over 35,000 people were repatriated; about half were war invalids, the others medical personnel or civilians.

As they advanced through Germany, the victorious Allied forces released prisoners of war held by the Reich, evacuated them behind the lines and repatriated them. Thanks to the extensive use of aircraft, the repatriation of Allied prisoners of war was completed in record time after Germany’s capitulation on 8 May 1945. The ICRC was not requested to help.

It was a different story when it came to the prisoners of war of the defeated countries, especially the Germans.

Article 75 of the Prisoners-of-War Code stipulated that the belligerents should normally include provisions for the repatriation of prisoners in their armistice agreements, and that in any case prisoners must be sent home as soon as possible after the conclusion of peace. But in 1945 there was neither an armistice nor a peace treaty. Germany, as a state, simply disappeared, and with it any possibility of negotiating the repatriation of prisoners of war.
This left the prisoners’ fate at the whim of the victorious governments. Although there was no risk of renewed hostilities, the Allies were in no hurry to repatriate the prisoners in their hands, who constituted a large, cheap workforce. Thus, the nature of their captivity had radically changed, for whereas the legitimate justification for holding prisoners of war had been to prevent them taking up arms again, this reason had disappeared when hostilities ended. They were now assigned to reconstruction work, and there was so much to do because of the devastation that it was impossible to say how long it might last. Captivity became forced labour, which former soldiers were obliged to perform by way of war reparations.

The ICRC continued its work for prisoners from the defeated nations, without letting this imply that it acknowledged any legal justification for their continued detention. Between 1 July 1947 and the end of January 1948, ICRC delegates in France made 801 visits to camps holding German prisoners of war.

No doubt these visits, and the little assistance that the Committee was able to give the prisoners, were a comfort at a time when uncertainty over the future was adding to the bitterness of defeat.

However, the main issue was the release and the return home of these prisoners; here, the ICRC took a clear stand against their prolonged captivity. As early as 21 August 1945, it issued a memorandum stating that prisoners of war should not be detained indefinitely, even in the absence of a peace treaty; it also stressed that to demobilize prisoners or modify their status without allowing them to return home could not be considered as having ended their captivity.

A year later, in a circular dated 2 July 1946, the ICRC underlined the serious consequences of the prisoners’ uncertainty over their continued detention, and urged the governments concerned to make known without delay their plans to repatriate them. It expressed its concern once more in an appeal issued on 31 December 1946, and again in a memorandum dated 28 November 1947, in which it pointed out that the continued detention of prisoners, more than two years after hostilities had ended, was a breach of international law:

The capture of prisoners of war has only a single aim: to prevent enemy combatants taking up arms once more. The prolongation of such a state of affairs cannot be justified by any military consideration, as soon as hostilities are actually ended. For this reason a principle has been embodied in international law demanding that, as soon as possible after the close of hostilities, all prisoners of war who are not the subject of penal proceedings or sentences shall be repatriated.

Besides drawing attention in this way to the principle involved, the ICRC was also negotiating with the governments directly concerned to try to speed up the repatriation of prisoners, in particular those held in countries where the climate might eventually affect their health, such as India, Egypt and South Africa.
ICRC delegates inspected most of the ships provided for the repatriations, and were generally present when prisoners of war were embarking and landing.\textsuperscript{92}

\textbf{The conflicts in Eastern Europe}

Eastern Europe was the scene of three conflicts. They were all part of the Second World War, but each was nonetheless a distinct episode:

- the war between the Soviet Union and Poland, from 17 to 30 September 1939, in which the Red Army seized more than 200,000 Polish prisoners;
- the war between the USSR and Finland, from 30 November 1939 to 12 March 1940;
- the war between Germany and the USSR, from 22 June 1941 to 8 May 1945; the Reich drew Romania, Italy, Finland, Slovakia and Hungary in its wake into what was to become a terrible confrontation between huge forces, extending from the Arctic Circle to the Caucasus and resulting in millions of prisoners.

Of the three wars, that between Germany and the Soviet Union was obviously the most crucial, but due consideration must also be given to the earlier conflicts and to the attitude of Germany’s satellites.

The significant legal point common to all three is that the Soviet Union – as well as Finland – was not party to the 1929 POW Convention.\textsuperscript{93} The ICRC was thus deprived of any legal basis for its work on behalf of prisoners captured on the Eastern Front; its right of humanitarian initiative entitled it only to offer its services, which were then subject to the parties’ consent.

Under these circumstances, what could the ICRC do?

Anxious to resume contact with the Soviet government and the Alliance of Red Cross and Red Crescent Societies of the USSR, on 27 September 1939 it sent a telegram to the People’s Commissar for Foreign Affairs, proposing to send a delegate to Moscow.\textsuperscript{94} It likewise approached the Soviet embassy in Paris.

On 12 October, the ambassador stated his government’s position:

The Union of Soviet Socialist Republics has not signed the 1929 Convention relating to prisoners of war; consequently the stipulations therein are not binding on the USSR. For this reason it is considered that the sending of a special delegate of the International Committee of the Red Cross to the Soviet Union to settle questions arising from the above-mentioned Convention is unnecessary.\textsuperscript{95}

Despite this flat refusal, the ICRC again approached the USSR on 26 October, but to no avail.\textsuperscript{96}

The outbreak of hostilities between the USSR and Finland prompted the Committee to reiterate its proposal.

On 4 December 1939 the ICRC offered its services to both countries. Finland agreed to the sending of a delegate, who obtained the assurance that the Finnish Red Cross was authorized to open an information bureau for
prisoners of war, as laid down by Article 14 of the 1907 Hague Regulations. By special favour, the delegate was allowed to visit a clearing camp for Soviet prisoners of war.97

At the same time the ICRC sent a mission to Paris for talks with the Soviet ambassador; it was led by Carl Burckhardt, a member of the ICRC’s governing body, accompanied by Dr Junod. The following February Burckhardt went to Berlin, where he met the Soviet ambassador and suggested going on to Moscow in order to discuss a range of pending issues and restore cooperation between the ICRC and the Alliance. The talks in Berlin, like those in Paris, came to nothing. Hostilities between Russia and Finland ended on 12 March 1940 and the negotiations were suspended.98

In April 1941 the ICRC sent a delegate, Miss Elsa Quinche, on a special mission to Stockholm to take up contact with the Soviet ambassador, Madame Alexandra Kollontay. During two meetings at the Soviet embassy, Miss Quinche expressed the ICRC’s wish to appoint a delegate in Moscow who would be accredited to the Alliance, as had been the case from 1921 to 1938. The ICRC confirmed its proposal in a letter on 23 April, but received no answer.99

On Sunday 22 June 1941 the German army invaded Russia. The next day the ICRC placed its services at the disposal of all parties to the conflict; in its telegram to the People’s Commissar for Foreign Affairs the Committee offered in particular to transmit information about prisoners of war and to open a branch of the Central Tracing Agency, at a place to be agreed. The ICRC stressed that the fact that the USSR was not party to the 1929 Convention must not form an obstacle to the execution of these proposals, in so far as their application was approved by the parties to the conflict.100

On 27 June the Soviet Commissar for Foreign Affairs, Viatcheslav Molotov, accepted the ICRC’s proposals, subject to reciprocity.101 After receiving similar replies from Germany and its satellites, the Committee decided to send Dr Junod to Ankara to take up contact with the Soviet government through its embassy there.102 He arrived in the Turkish capital on 22 July to conduct in-depth negotiations, the primary issue being the transmission of POW lists. On 20 August, the ICRC was able to forward to the USSR a list of 300 Soviet prisoners held by Germany; the names were written in pencil, in Cyrillic characters, on unofficial ordinary squared paper.103 Longer lists were sent to the ICRC from Finland, Romania and Italy.104 In Moscow, the National Society announced the opening of an information bureau for prisoners of war, but the ICRC never received any lists, either directly or through its delegation in Ankara.105 Taking the lack of reciprocity as an excuse, the German government declared on 24 September 1941 that it would send no more lists of prisoners as long as there was no effective quid pro quo.106 Discussions continued throughout the autumn and winter, but no progress was made.

So the negotiations which had begun with some encouraging statements from all sides became bogged down because the commitments made
depended on reciprocity. Each side accused the other of the most barbaric atrocities, while at the same time demanding evidence of the other’s intention to apply the humanitarian conventions.\(^{107}\)

Meanwhile, increasingly alarming reports were circulating over the appalling plight of Russian prisoners in Germany. The ICRC had no first-hand information – this could come only from visits to the camps – but it was well aware that the Soviet prisoners of war lacked even the barest necessities and were dying in their thousands.\(^{108}\) Assistance was desperately needed. In response to the ICRC’s approaches, the German authorities made it known that they would not object to collective relief consignments being sent, which would then be distributed by the camp commandants without any external supervision.\(^{109}\)

Quite obviously, this was unacceptable to the Allies, and especially to the British. While London was prepared to facilitate the passage of relief consignments for Russian prisoners of war and even to provide large quantities of food and other items, it made this conditional on the distributions being properly supervised. But without access to the camps, such supervision was impossible. The supply of relief hinged on permission to visit the prison camps.\(^{110}\)

Only in Finland were ICRC delegates allowed to visit camps for Soviet prisoners, and to distribute parcels there sent by the American Red Cross.\(^{111}\) Germany forbade all visits to Russian prisoners for as long as the ICRC remained unable to visit German prisoners held in the Soviet Union. Since the ICRC had no delegates in the USSR, its hands were tied.\(^{112}\)

The key to the problem, therefore, lay in the question of the ICRC’s presence in the Soviet Union. From the summer of 1941, the Committee took steps to try to re-open a permanent delegation in Moscow, where it had been represented from 1921 to 1938. In September 1941 a visa application for Dr Junod was lodged with the Soviet embassy in Ankara.\(^{113}\) As it remained unanswered, further attempts were made through the embassies in London and Stockholm.\(^{114}\) The Committee put forward the names of several delegates, both Swiss and Swedish, inviting the Soviet government to choose whomsoever it preferred; again, there was no reply.\(^{115}\) The name of Voldemar Wehrlin, who had been the ICRC’s representative in Moscow from 1921 to 1938, was also submitted – but all was in vain, and no visa was forthcoming.\(^{116}\)

At the same time the ICRC also proposed sending temporary missions to Moscow. Because of the complexity of the issues at stake it seemed virtually impossible to advance in the negotiations without direct contact with the Soviet government and the Alliance of Red Cross and Red Crescent Societies of the USSR. As Switzerland was encircled by Axis forces there could be no question of an Alliance representative travelling to Geneva, so the ICRC suggested sending a delegation to visit Moscow. Various solutions were discussed, and in the end the Alliance and the ICRC agreed to establish contact in Teheran.\(^{117}\) However, the representative sent there by the Alliance made it
clear that the latter ‘was wholly absorbed by its relief work at home and had temporarily abandoned all foreign activities’. Nevertheless, the discussions went on for several months. On 9 August 1944 the Alliance delegate said that his organization was no longer authorized by the Soviet government to maintain official relations with the ICRC. Voldemar Wehrlin stayed in the Iranian capital until the end of the year, but relations between the Committee and the Alliance remained suspended until after the war.

So all the ICRC’s efforts to assist prisoners captured during the conflicts in eastern Europe ended in failure. The Soviet prisoners in Finland were the only ones to receive help regularly, although some Russian prisoners of war in Germany benefited indirectly from the assistance supplied to British and American prisoners. During the final weeks of the war, the prevailing chaos in Germany and the mingling of prisoners of all categories and all nationalities enabled the ICRC to assist without distinction whatever prisoners of war its convoys could reach. Despite this minor achievement, the cruel fact remains that millions of prisoners of war on both sides were denied the assistance that was offered. Many of them did not survive the hardships of captivity and died from cold, hunger, exhaustion, lack of care or ill treatment.

How did this failure come about?

The International Committee repeatedly offered its services to all parties involved; every possible opportunity for contact was taken and all conceivable solutions were explored. So no blame can reasonably be attached to the ICRC for this failure, that was shared by the Protecting Powers appointed by the belligerents and even, up to a point, by the British and American governments which tried to persuade their Soviet ally to accede to the 1929 Convention.

The answer lies in the attitude of the belligerents themselves.

From the start, Nazi Germany saw the conflict with Russia as an ideological crusade and a racial struggle in which the laws of war were irrelevant. The maintenance of order and security in the occupied areas of the Soviet Union was in the hands not of the Wehrmacht but of special Gestapo and SS units, which committed innumerable atrocities. Moreover, evidence given by General Halder and Field Marshal Keitel at the Nuremberg trial revealed that Hitler had given orders for the laws and customs of war to be ignored during the Russian campaign, on the pretext that the Soviet Union was not party to the Convention on prisoners of war. There is no doubt as to the responsibility of the Third Reich’s leaders. But in all negotiations with regard to Soviet prisoners of war, Germany took refuge behind the fact that the USSR had not acceded to the 1929 POW Convention, and that there had been no reciprocity on the part of Moscow.

The attitude of the Soviet government, therefore, also has to be analysed. Why did the USSR not accede to the 1929 Convention, despite the urging of the ICRC and of its allies? Why did it never communicate lists of the prisoners it was holding? Why did it never allow the ICRC’s delegates or those of the Protecting Powers to visit its prisoner-of-war camps?
The answer is locked in the official Soviet archives. The fact remains that the authorities in Moscow never took part in any real negotiations; most of the International Committee’s approaches received no reply and the ICRC was never able to send even so much as a temporary mission to the USSR for a serious discussion of the problems. Faced with so many unanswered questions, we are left with hypotheses, none of which is very convincing.

Russian historians who have had access to recently declassified Soviet records have come to the conclusion that Stalin wanted Soviet prisoners of war in German hands to meet the most dreadful fate so that Red Army officers and men would give up any idea of surrender and fight to the finish, knowing that there was no alternative but victory or death.125

In these circumstances, all ICRC approaches were doomed.

The war in the Far East

In the sweeping offensives that followed the attack on Pearl Harbour, the Japanese army gained control over half of Asia and took tens of thousands of prisoners of war. But any illusions that because Japan had taken part in drafting humanitarian law, it actually subscribed to its underlying philosophy, were soon to be dispelled.

The status of prisoner of war is rooted in the implicit idea that captivity in wartime is a consequence of misfortune rather than cowardice. This notion, which had not been accepted in Europe without some reservations,126 had never taken hold in Japan, however much the country had embraced Western ideas in other fields. Defeat, for a Japanese soldier, meant unbearable dishonour, and captivity a lasting shame which reflected on the whole family. When he went away to war, he knew he could return alive only as a victor: for the vanquished, death was preferable to the indelible stain of disgrace.127

From this perspective, anyone who surrendered voluntarily was viewed with deep contempt, which was reinforced by the deeper antagonism stemming from cultural differences and Japan’s national pride. There was no sense of respect for the conquered enemy as a human being.

In any case, although Japan had taken part in the 1929 Diplomatic Conference and had ratified the Geneva Convention on the wounded and sick, it was not party to the 1929 Convention on the treatment of prisoners of war.128

Furthermore, the number of Japanese prisoners in Allied hands remained for a long time very small, even after Japan began losing the military initiative. This meant that any argument based on mutual interest fell on deaf ears in Tokyo.129

Faced with this apparently intractable problem, what could the ICRC hope to achieve?

After the attack on Pearl Harbour, the ICRC offered its services to the countries fighting in the Pacific. In urging the governments concerned to com-
municate information about prisoners of war to the Central Agency in Geneva, the ICRC stressed that even though Japan was not party to the Prisoners-of-War Code, this should not prevent it from being applied *de facto*, provided there was reciprocity. The Committee also proposed that its correspondent in Tokyo, Dr Fritz Paravicini, be accredited as the official ICRC delegate in Japan.\textsuperscript{130}

The governments agreed to the ICRC’s requests; the Japanese announced the opening of an information bureau for prisoners of war and accepted the appointment of Dr Paravicini.\textsuperscript{131}

However, it was still vital to know how the Japanese stood with regard to application of the POW Convention. In reply to further approaches by the ICRC, the Japanese Legation in Berne set out its government’s position in the following terms:

> Since the Japanese Government has not ratified the Convention relating to the treatment of prisoners of war, signed in Geneva on 27 July 1929, it is not in fact bound by the said Convention. Nevertheless, as far as is possible, it intends to apply the Convention, mutatis mutandis, to all prisoners of war falling into its hands, while at the same time respecting the customs of each nation and people in relation to the food and clothing of prisoners.\textsuperscript{132}

This declaration of intent – which was far from being a pledge to abide by the Convention – included some important reservations. In stating it would apply the Convention ‘mutatis mutandis’, Tokyo was saying that it reserved the right to choose which provisions it intended applying and which it would ignore, according to the circumstances and at its own discretion. The statement lacked an essential element: the will to submit to the terms of the Convention.

Indeed, whenever Japanese officials were adjured to respect the Convention, they never hesitated to point out that their country was not bound by its provisions.\textsuperscript{133}

It is hardly surprising, therefore, that the ICRC came up against a host of problems, due both to the lack of any legal basis for its work and to the suspicion shown by Japan’s military leadership towards any foreign organization.

The first arose over the accreditation of the Committee’s delegates. Japan agreed to the appointment of delegates in Tokyo, Shanghai and Hong Kong, but refused to recognize those who had been designated before the Japanese occupation of Singapore, Java, Sumatra and Borneo, as well as those in Manila and Bangkok.\textsuperscript{134} As they were thus deprived of any official status, their activities were restricted and performed merely in a personal capacity, with great difficulty and at considerable risk – as shown by the execution of Dr Vischer and his wife.\textsuperscript{135}

Moreover, the appointment of a new head of mission in Japan to replace Dr Paravicini, who died in January 1944, was not accepted until a year later.\textsuperscript{136} The ICRC’s repeated requests for permission to send a temporary mission to Japan were persistently stalled, so that the Committee was unable
to establish direct contact with its delegates in the Far East until after the
hostilities ended. Other problems concerned the lists of prisoners of war passed on by the
Tokyo information bureau: they were never complete and took months to
arrive in Geneva. The time lag, coupled with the difficulty of transcribing
Western names into Japanese, made it extremely hard to identify prisoners
with any degree of certainty. For their part, most Japanese prisoners of war
refused to allow their names to be passed on, or concealed their true
identities. Prisoners’ correspondence was subject to the whim of individual comman-
dants and suffered delays: many prisoners were never allowed to write home,
while in other cases letters were held back for several months. But without any doubt, the delegates’ main problem lay in gaining access
to the prison camps. Large areas had been designated as war zones; delegates
were refused access to them, and so were unable to visit any prisoners held
there. In Japan itself, the very existence of some camps was kept secret until
after the surrender. Moreover, each visit had to be authorized individually, a
lengthy process which reduced the frequency of the visits. When they did take
place, they were generally restricted to two hours, consisting of one hour spent
with the camp commandant, thirty minutes touring the camp, and a further
half-hour of talks with prisoners selected by Japanese officers and in the latter’s
presence. The delegates’ repeated requests to be allowed to talk privately with
the prisoners’ representatives were never granted, and so the visits lost much of
their value, both for the ICRC and for the prisoners themselves.

The transport of relief supplies for prisoners in Japanese hands was also
extremely problematic, not only because of the distances involved. Small
amounts of food and other supplies had been sent on ships chartered to take
home diplomats and their families, but negotiations to establish a sea link for
regular relief consignments to the main camps remained unsuccessful. The
delegates were forced to buy locally whatever supplies they could find, but
exchange rates imposed by the Japanese authorities drastically reduced the
purchasing power of the funds at their disposal.

So despite the countless approaches made by the ICRC and the unremitting
efforts of its delegates in the field, its achievements in the Far East were few
and far between and their practical results were trifling as compared with the
dreadful plight of the prisoners there.

**Combatants who were denied prisoner-of-war status**

The occupation of most of Europe by the Axis forces led to great political
upheavals: countries were split up or disappeared, new and unrecognized
‘states’ were created, governments were dissolved, exiled or reconstituted,
cease-fires were agreed, alliances reversed. The list is endless; and throughout
occupied Europe clandestine resistance movements bent on continuing the
struggle came into being.
The chaos was mirrored in the confused legal situation: many groups challenged the political changes and continued to fight, either in the occupied territories or alongside the Allied forces, while the Axis powers refused to regard members of the resistance as combatants, treating any they captured as outlaws.

The International Committee felt that respect for human life should not depend on legal or political judgements by governments as to whether one group or another was legitimately engaged in combat. It frequently requested that captured resistance fighters be granted the protection of the 1929 Convention, provided they had fulfilled the four conditions laid down in Article 1 of the Hague Regulations, which required them to be commanded by a person responsible for his subordinates, to have a fixed distinctive emblem recognizable at a distance, to carry their arms openly, and to conduct their operations in accordance with the laws and customs of war.\[144]\[144\]

The ICRC intervened to that effect on numerous occasions, in particular on behalf of French, Slovak, Yugoslav, Italian, Polish and Greek partisans.\[145]\[145\]

Seeing that partisan activity was spreading to more and more countries in the wake of the major Soviet offensives in the east and the Normandy landings, on 17 August 1944 the ICRC sent a memorandum to all the belligerents in which it stated that ‘when, in the course of war, situations arise analogous to those of war, but not explicitly covered by International Conventions, the fundamental principles of international law and of humanity should nevertheless be regarded as applicable’. The ICRC said it believed that ‘all combatants, without regard to the authority to whom they belong, should enjoy the benefit of the provisions applicable to Prisoners of War, if they fall into enemy hands …’, provided that these combatants respected ‘the laws and usages of war …’. It further demanded that auxiliary Red Cross organizations be allowed to help the wounded and sick, and called for the application of the said principles ‘irrespective of all juridical arguments as to the recognition of the belligerent status of the authority to whom the combatants concerned belong’, saying that it was available to act as a neutral intermediary between the warring parties.\[146]\[146\]

The ICRC continued its efforts on behalf of resistance fighters until the end of the war – but to what avail?

As its approaches had no legal basis accepted by all parties, since its status as a neutral intermediary was questioned by the occupying power, and as the argument of reciprocity generally could not be invoked, its efforts had very limited effect. Still, despite the particular nature of the partisan war and the appallingly brutal repression inflicted by Nazi Germany and its cohorts, the ICRC did in a few instances manage to save the lives of captured resistance fighters; these were interned in POW camps where it was possible to help them as though they were regular prisoners of war.\[147]\[147\] However, in most cases the Committee’s efforts were in vain: captured partisans were either summarily executed or sent to concentration camps, to which the ICRC had no access.\[148]\[148\]
The Committee also interceded on behalf of French, Belgian, Dutch and Polish prisoners of war who, either voluntarily or because of pressure from their captors, had accepted the status of civilian workers and were consequently denied the protection of the POW Convention. But while it succeeded in setting up a family message service for these former prisoners of war, it never managed to ensure workable safeguards for them or to provide them with food when acute shortages ravaged Germany.\textsuperscript{149}

The situation was similar for Italian servicemen who were disarmed by the Wehrmacht and interned in Germany after the armistice between the royal Italian government and the Allies. Claiming that they were subject to the neo-Fascist government established by Mussolini in northern Italy and which was still Germany’s ally, the German Supreme Command refused to recognize these men as prisoners of war. Despite the ICRC’s efforts on their behalf, conditions for these prisoners, who were cut off from all help, were horrifying – similar, in fact, to those endured by Soviet prisoners of war.\textsuperscript{150}

Lastly, in 1945 the Allies refused prisoner-of-war status for German and Japanese soldiers who fell into their hands after the capitulation of their respective countries, claiming that their situation was not covered by the 1929 Convention. Instead, they were classed as ‘Surrendered Enemy Personnel’ (SEP).

The ICRC protested against this measure, considering that its legality was questionable and that it created a dangerous precedent likely to undermine the moral authority and binding nature of the POW Convention. Nonetheless, the Allies’ decision did not seriously limit its scope for action: the ICRC helped the ‘Surrendered Enemy Personnel’ in much the same way as it assisted prisoners captured earlier, and continued to do so until they were repatriated.\textsuperscript{151}

* *

It can thus be seen that the Committee’s efforts to assist prisoners of war and, in a broader sense, all combatants captured by the enemy, achieved varying degrees of success. The ICRC had accomplished miracles – but it had also suffered grievous failures.

These mixed results were largely due to the fact that not all prisoners enjoyed the same legal status – and, most importantly, to whether or not the Committee could base its activities on the Prisoners-of-War Code. But they were also affected by the belligerents’ relative positions of strength, and by the extent to which reciprocity could be invoked to allow the ICRC to act as a neutral intermediary.

If the ICRC encountered such difficulties in the only field where it had a legal basis to work on, it is hardly surprising that it met with even greater problems in an area where it had none – the protection of civilians in the power of an enemy.
6. Civilians under enemy domination

War has never been kind to civilians, who all too often find themselves at the mercy of a rabble of undisciplined soldiers. But the principle that the civilian population was entitled to general immunity had developed through the ages and had finally become binding: war had to be fought against the enemy’s armies, and civilians who took no part in the fighting should be spared.

The St Petersburg Declaration of 1868 stated: ‘...the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.’\textsuperscript{152} This was echoed in the Final Protocol of the 1874 Brussels Conference: ‘...the only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering.’\textsuperscript{153} Article 7 of the Manual of the Laws of War on Land, adopted by the Institute of International Law at its Oxford session in 1880, declared succinctly: ‘It is forbidden to maltreat inoffensive populations.’\textsuperscript{154} These principles were enshrined in the Hague Conventions of 1899 and 1907, notably in Article 46 of the Hague Regulations which expressed the basic rights of the inhabitants of occupied territories: ‘Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected .... Private property cannot be confiscated.’\textsuperscript{155} During the Second World War this precept – the immunity of the civilian population – was utterly violated.

At the outbreak of hostilities the belligerents, as in August 1914, interned most enemy civilians who were in their territory.

The successive victories of the German army then led to the occupation of most of Europe, where an increasingly brutal rule was imposed, marked by arbitrary arrests, deportations, hostage-taking and summary executions.

Each new conquest extended the persecution which, since 1933, had been inflicted upon persons regarded by the Nazi regime as its enemies: liberals, Social Democrats, Communists, trade unionists, pacifists, gypsies and Jews.

Stripped of all their belongings, herded into overcrowded ghettos, forced to wear a yellow star – an invitation for discrimination and aggression – the Jews were singled out for countless forms of humiliation and brutality, deportation and mass murder. At the Wannsee Conference on 20 January 1942, the leaders of the Third Reich decided to have the Jews in the territories under their control systematically exterminated. From then on, arrests increased; one after another, the ghettos were emptied and their inhabitants deported to camps, never to be heard of again.\textsuperscript{156}

Hitler’s perverted philosophy thus put in place a huge and monstrous system of persecution whose tentacles stretched across Europe, ending in the concentration camps and gas chambers.

The ICRC’s unremitting attempts during the inter-war years to bring about an international agreement protecting civilians in wartime had failed to produce any results. The Draft International Convention concerning the
Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in Territory occupied by it (Tokyo Draft) had been approved by the Fifteenth International Conference of the Red Cross held in Tokyo in 1934, but events had forestalled its subsequent adoption by a diplomatic conference.157 In September 1939, as in August 1914, civilians in the power of an enemy had virtually no legal protection.158

The ICRC therefore approached the belligerents on 2 September 1939, proposing the provisional adoption of the Tokyo Draft as a temporary measure for the duration of the war.159

Oddly enough, the only reply came from the German government, which said it ‘would be prepared to discuss the conclusion of a convention for the protection of civilians on the basis of the “Tokyo Draft”’.160

The Committee reverted to the matter in a memorandum dated 21 October: it repeated its recommendation that the Tokyo Draft be provisionally adopted, but proposed that if this was not possible, the governments should extend to civilian internees the protection of the Prisoners-of-War Convention.161

This latter solution was finally chosen. In letters dated 23 and 27 November 1939 and 30 April 1940 respectively, the French, German and British governments agreed to apply to civilian internees the provisions of the 1929 Geneva Convention relative to the treatment of prisoners of war; exception was made of those provisions which, by their very nature, concerned military prisoners alone.162

Thereafter most of the other countries which took part in the hostilities also agreed, either formally or de facto, to treat civilian internees according to the relevant provisions of the said Convention.163 On 7 December 1939 the ICRC sent the belligerents a note specifying, article by article, which provisions could be applied to civilian internees and giving interpretative guidelines as to their application.164

So the ICRC’s initial efforts for civilians in enemy hands achieved a favourable – albeit limited – result. Throughout the war, it was able to carry out the same activities on behalf of civilian internees as for prisoners of war: registration by the Agency, transmission of family messages, visits to internment centres, provision of relief, involvement in repatriation procedures.165

But it was in fact no more than a half measure, for the agreement covered only foreign civilians who happened to be on enemy soil at the outbreak of hostilities, and who were interned by reason of their nationality. It differed from the Tokyo Draft in that it did not include the inhabitants of occupied territories; they were protected only by Articles 42 to 56 of the Hague Regulations, which had proved to be of little use during the First World War.

As the victories of the Wehrmacht brought ever more territory under the domination of the Reich, they also erased the possibility of negotiating any protection for the population there. Indeed, once its army had tightened its grip on the defeated nations to the west and east, there was no longer any reason for Germany to agree to discuss proposals designed to restrict the
rights of the occupying power; nor could the argument of reciprocity be advanced. It was not until the autumn of 1944, when the Allied armies were at the gates of the Reich, that any opportunity arose for negotiations over the fate of civilians – and by then it was too late.

Faced with a dictatorial regime at the zenith of its power, the ICRC found itself devoid of means of action, either legal or political. Its only weapons were persuasion and moral authority, and experience had already shown that these made little impression on the leaders of the Third Reich.

Yet it could not give up the people of the occupied territories as a lost cause. An account of what the ICRC did – or tried to do – for them is therefore given below. For the sake of clarity, a distinction will be made between the question of political and racial persecution, and that of the concentration camps, even though the victims were often the same and the path of persecution usually led to the camps.

* *

Shortly before the war, the International Committee had approached the German Red Cross about Jews on two occasions, offering its services first on behalf of internees, and later for those who were too sick to accompany people able to emigrate from the Reich. Both offers were dismissed, for although the Jews had been deprived of their nationality within Germany, the authorities still brandished the principle of national sovereignty to prevent any representations on their behalf. The Jews had been stripped of their rights as citizens, but for outside purposes were still, according to the Reich, German nationals.

In December 1939, President Huber had talks with the External Relations Director of the German Red Cross, Mr Hartmann, about Jews from Vienna who had been deported to Poland. This meeting likewise achieved nothing.

The ICRC was soon forced to admit that any specific intercession on behalf of Jews was bound to fail, as the Ministry of Foreign Affairs and the German Red Cross simply refused to discuss the subject. The question of race, which was giving rise to the most vicious persecution, could not be invoked to justify the need for protection.

Consequently, the only possible means of alleviating their plight was to take a more general approach and intervene on behalf of victims of mass arrests or deportations, while avoiding any reference to race or religion, although it was clear that most of the people concerned were Jewish. For instance, the Committee asked its Berlin delegation in April 1942 to intercede with the Reich Ministry of Foreign Affairs on behalf of internees at the Drancy and Compiègne camps in France who had been deported to Germany.

On 1 June 1942, Professor Carl Burckhardt, a member of the ICRC’s governing body, sent a personal letter to the Acting President of the German Red Cross, Dr Ernst Grawitz, about the taking of hostages in Holland. Strictly
speaking, the letter concerned only the situation of the many Dutch hostages whose arrest had been reported in the press. But couched as it was in general terms, it called into question the behaviour of the German authorities throughout the occupied territories, and in particular the problem of arbitrary arrests.

After stressing the ‘paramount importance’ he attached to the subject, Professor Burckhardt referred to Article 19 of the Tokyo Draft, which forbade the killing of hostages, and to Article 50 of the Hague Regulations, which prohibited the infliction of general penalties upon the population on account of individual acts for which the population could not be regarded as responsible.

Burckhardt then drew attention to the efforts made by ICRC delegations on behalf of German nationals living overseas, particularly for interned civilians, and to the substantial improvements obtained in their conditions. The ICRC had regularly supplied the Reich with detailed reports on these activities, but, he pointed out, the work could not have any practical and lasting effects unless its results were borne in mind by the German authorities in their treatment of enemy nationals in their hands:

There is nothing we more ardently desire than to do everything within our power, as we have been doing until now, to relieve the often sorry plight of non-combatant war victims. But how could we and our delegations count upon the understanding and goodwill of the authorities of any of the Detaining Powers, if they can object that the facilities they grant are as a rule not requited by Germany?

He urged Dr Grawitz to use all his influence to ensure that the competent authorities ‘take into account the difficulties encountered by our delegates in the different belligerent States, and the pre-condition of reciprocity’.

In basing his main argument on the principle of reciprocity, Professor Burckhardt was not prompted by any mercenary inclination; he did so because he was convinced that it was the only argument the Nazis might heed.

Dr Grawitz replied on 7 July. While claiming to share the ICRC’s concern, he regretted that he was unable to reply in a satisfactory manner to Professor Burckhardt’s letter; at the same time, he stressed that any action against interned German civilians would be counter-productive, saying that: ‘... I nevertheless share your hope that any deterioration in the situation of my countrymen, now or later, will be avoided, as such measures always lead to reprisals’. Grawitz also underlined the distinction which he believed should be made between the requirements with which the German authorities were confronted in the occupied territories and the attitude towards civilian internees for whom the agreements provide a specific system of treatment. He closed by declaring that he was unable to offer any effective mediation by the German Red Cross, emphasizing that military requirements alone had made the German authorities act as they did, and added that ‘for the moment it is impossible to invoke even certain principles which lie close to our hearts’.
Thus, the ICRC’s approaches were once again rejected on grounds of inadmissibility. When presented with the argument of reciprocal interest, the head of the German Red Cross responded with a threat of reprisals; humanitarian principles could not even be mentioned.

The German authorities showed the same attitude towards individual enquiries. Since the start of the war, the Central Agency had been trying to trace the whereabouts of individual deportees. A special section – the Service des Civils internés divers (CID) – had been set up to deal with cases that were not covered by any of the Agency’s national services; it was concerned in particular with German and Austrian Jews, with survivors of the International Brigades and with stateless persons. But although the CID Service worked with infinite patience and care, its results were disappointing owing to the lack of co-operation from Germany. On 29 April 1942 the German Red Cross announced that it would no longer give any information on non-Aryan detainees moved from occupied territories and requested the International Committee henceforth to send it no more enquiries about such people. On 20 August, it stated that it was no longer able to obtain information on non-Aryans detainees in territories occupied by the Wehrmacht.

Faced with a regime that had no doubts as to its ultimate victory, the ICRC’s approaches at the diplomatic level seemed doomed to failure. But might it not be possible to achieve at least something by providing relief?

The needs were urgent. As the Jews had been forced out of work, robbed of their possessions and crammed into ghettos, their very survival was at stake. Some form of assistance, however limited, would give them a chance.

Through the German Red Cross, the Committee had sent some relief supplies to an aid organization for Polish Jews, the Jüdische Unterstützungsstelle. Dr von Wyss, a delegate of the Joint Relief Commission set up by the ICRC and the League of Red Cross Societies in October 1940, had twice been sent to Poland, but had not been able to be present at any distributions. As a test case, the ICRC had furthermore sent some packages of medicines to the Theresienstadt (Terezin) ghetto in Czechoslovakia, but had received no confirmation of their arrival.

In 1943 the ICRC decided to step up its assistance programmes for the Jewish communities, especially those in Hungary, Romania and Slovakia – Germany’s allies and satellites. It also tried to include Jews among the beneficiaries of relief operations conducted under its auspices in the occupied countries, especially in Greece.

Jewish organizations, in particular the World Jewish Congress and the American Joint Distribution Committee, had placed considerable financial resources at the ICRC’s disposal. But as the International Committee was unable to supervise the distributions of relief supplies, it was not allowed to import them from overseas; purchases had to be made within Europe, at a time when shortages in most countries on the continent were becoming increasingly acute.
The ICRC’s delegates were also seriously hindered by the occupation authorities and local officials. Their presence and their work were barely tolerated, and some activities had to be carried out clandestinely – such as providing funds to enable Jews in Slovakia who had managed to evade the mass deportations of 1942 to continue living in hiding.\textsuperscript{179}

In these conditions, the ICRC’s efforts to assist the Jews inevitably had a very limited effect: they helped some victims of the persecution to survive, in the hope of better days to come, but for most of them those days never dawned.

Would it have been possible to protect Jewish victims of persecution by helping them to leave Europe?

Until the summer of 1941 not all European borders were closed, although it was far from easy to get across them, and to find a country willing to grant asylum was not the least of the difficulties involved. In fact, very few people managed to escape to Spain or Turkey.

At the time, the Committee considered that emigration should be dealt with solely by governments and by the organizations they had established for that purpose, in particular the High Commissioner for Refugees and the London Intergovernmental Committee, formed after the ill-starred Évian Conference in July 1938 which had tried in vain to find countries of asylum for German and Austrian refugees.

In the spring of 1942 the ICRC became involved in a plan by the Jewish Agency to transfer 270 Jewish children to Palestine: it agreed to transmit a request for exit visas for them to the Romanian and Hungarian governments. Under the pressure of events in the summer and autumn of 1942, the ICRC consented to support emigration more actively and to lend a hand with other similar projects.

In late summer 1943 the ICRC sent a delegate to Budapest and assigned a second delegate to its mission in Bucharest. This increased presence in the Danube region was intended to help carry out several schemes to enable Jews to emigrate to Turkey, and from there to Palestine or Latin America. Romania played a key role in this, first because its government had for some time seemed rather well-disposed, and secondly because Romania’s Black Sea ports were now the continent’s only exit points not subject to direct German supervision, since the Germans now controlled the Franco-Spanish frontier and Bulgaria’s borders.

With the support of the Jewish organizations, the ICRC and its delegates devised a variety of plans which demanded their constant contact with the governments concerned and the exchange of numerous telegrams between Geneva, Berlin, Budapest, Bucharest, Ankara, London and Washington.

All their efforts were in vain. None of the plans materialized, and the only Jews who managed to leave Europe did so secretly, at their own risk, on board ships so old and dilapidated that many of the refugees drowned at sea.\textsuperscript{180}
This failure was hardly surprising: it was simply not possible to leave Europe without Germany’s consent. The Reich’s leaders were not prepared to compromise their pro-Arab policy by allowing more Jews to emigrate to Palestine. But beyond this, the Nazis feared that by fostering Jewish migration they would encourage the formation of a Jewish homeland from which world Jewry would draw new strength. In the pathological view of Hitler and his cronies, Jews who were not under German control were even more dangerous than those who were. Furthermore, as was revealed after the war, the Nazis decided in January 1942 on a more brutal way to get rid of the Jews.

Furthermore, the difficulties that arose from the closure of potential countries of asylum, whether Allied or neutral, should not be ignored. When these countries did at last agree to open their borders, either in late 1944 or early 1945, it was too late.

The defeats suffered by the German army did not lead to any lessening of the persecution – on the contrary, they exacerbated the murderous frenzy of the Reich’s leaders, which now reached its peak. The systematic deportation of Jews from Hungary began in the spring of 1944. But whereas in 1942 and 1943 the Nazis had succeeded in maintaining an aura of doubt over the existence of the death camps – and therefore over the true purpose of the deportations – in 1944 things were different. In early July newspapers in neutral countries, including Switzerland, published detailed articles about Auschwitz.

On 5 July the President of the ICRC sent a letter to the Hungarian Regent, Admiral Horthy, in which he referred to the alarming information reaching the ICRC, expressed his concern over the ‘severe measures allegedly being taken against Jews of Hungarian nationality’, requested clarification and beseeched the Hungarian government ‘to prevent the occurrence of the slightest act that might give rise to such monstrous reports’. Horthy replied on 12 August, saying ‘it is not within my power to prevent inhuman acts, which no one condemns more severely than do my people ...’. The Primate of Hungary, the Vatican and the King of Sweden had made similar representations a few days earlier; and the United States had reiterated its determination to hunt down and punish anyone who took part in the persecution and deportations.

On 7 July the Hungarian government did in fact order a halt to deportations. The Hungarian chargé d’affaires in Berne informed Carl Burckhardt of this on 18 July and said that the ICRC was authorized to distribute relief to all Jews in the ghettos and camps.

The reprieve was short-lived. On 15 October 1944 the Germans deposed Horthy and installed a puppet regime led by the fascist Arrow Cross movement; this ushered in a new wave of persecution and deportations.

On 15 December the ICRC President wrote to Monsignor Tiso, the Slovak Head of State, about the deportation of Jews from Slovakia. In his reply, Mgr Tiso expressed regret that his government had been obliged to resort to
‘material measures affecting individuals’, but claimed this was dictated by necessity.\textsuperscript{188}

So all the ICRC’s efforts to help victims of racial persecution had little effect: the Nazi authorities refused any intercession on behalf of the Jews, declaring it unwarranted, while the leaders of Germany’s satellites professed themselves powerless to prevent acts which they claimed to regret.

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What possibilities were there for ICRC delegates stationed in the various European countries to help the victims, even though the Committee, as an institution, was prevented from doing so?

In Germany, Poland and the occupied areas of the USSR, the ICRC’s delegates were unable to do anything significant for the Jews. Throughout the war, the ICRC was in any case never allowed to open a delegation in occupied Poland, nor was any delegate ever permitted to visit the occupied areas of the Soviet Union.

Efforts made in other occupied countries (including Norway, Holland, Belgium, France and Greece) produced results that at best were tragically inadequate. In some cases – notably Greece – delegates succeeded in handing out relief items to people about to be deported.\textsuperscript{189} Elsewhere the delegates managed only to gather second-hand information and reports on the number of deportees, and occasionally their identity. Concrete attempts to protect the victims of persecution were swiftly countered by the occupying power: Dr René Burkhardt, the ICRC’s deputy delegate in Salonika, had to be recalled at Germany’s insistence after he protested over the deportation of the city’s Jewish community.\textsuperscript{190}

It was only in Germany’s satellites and allies – Slovakia, Croatia, Italy, Hungary, Romania and Bulgaria – that the ICRC’s delegates achieved some limited results: with the complicity of some local officials, and taking advantage of the misgivings felt by the authorities and population in view of the Wehrmacht’s successive defeats, they carried out several rescue operations during the closing months of the war and succeeded in providing a limited measure of protection to some of the victims of persecution.

This was notably the case in Hungary which, in the spring of 1944, was the only European country under Hitler’s sway whose Jews had, relatively speaking, been spared. Like all Germany’s allies, the Hungarian government had introduced anti-Semitic legislation, but it had not been applied as severely as elsewhere. There had certainly been pogroms, looting and killing, but no systematic annihilation. Hungary was at that time home to some 800,000 native Jews, as well as thousands more who had fled from Poland, Slovakia and Yugoslavia.

It was, however, the lull before the storm: on 19 March 1944 the Wehrmacht occupied Hungary, and in its wake the SS established its unre-
lenting authority. Between 15 May and 7 July virtually all Jews in the rural areas were sent to Auschwitz by special SS squads, aided by their local agents: in all, more than 400,000 people were deported.

The ICRC’s delegates – Jean de Bavier and his successor after 17 May, Friedrich Born – could only look on helplessly as this first wave of deportations took place.

But the assurances which the Hungarian government gave the ICRC in July 1944 enabled Friedrich Born to intervene in a domain which the authorities had hitherto considered as strictly internal. Accompanied by Dr Schirmer, who had come to deliver President Huber’s message to Regent Horthy, Born visited the concentration camps at Kistarcsa and Szarvar and protested over the deportations carried out by the SS in mid-July, despite the solemn undertakings of the Hungarian authorities.

Born also agreed to pass on the immigration certificates which had been issued by some Latin American countries, particularly Nicaragua, El Salvador and Mexico; he furthermore repeatedly sought to arrange for Jews to be transferred to Switzerland, Sweden, Spain, Palestine and the United States, and submitted countless proposals to this effect. Although his efforts failed to bring about any actual transfer to countries of asylum – hardly surprising since it was impossible to leave Hungary without crossing territory controlled by the Reich – at least some measure of protection was offered by the documents he so unstintingly handed out.

In addition Born organized about sixty children’s homes, which gave shelter to between seven and eight thousand Jewish children, many of them orphans. He also took all Jewish hospitals, shelters and soup kitchens under his protection and provided most of their supplies, thanks partly to the money sent by Jewish organizations abroad and partly to the generosity of Jewish charities in Hungary itself. To carry out this huge operation Born recruited three thousand volunteers, most of them Jewish, to whom he gave identity cards. After obtaining the ICRC’s agreement, he put up signs with the following words, in Hungarian, German and French, on the buildings housing these various facilities:

The persons confined in this building by order of the Hungarian authorities are, with the consent of the said authorities, placed under the protection of the ICRC and visited by its delegates. Kindly respect this protection. ICRC Delegation .... (address).191

These measures were generally respected until Horthy’s overthrow on 15 October 1944. The newly installed Arrow Cross government reintroduced anti-Semitic policies with unprecedented brutality. In the space of a few days, 50,000 Jews from Budapest were put into an improvised concentration camp, at the Altföuer tile factory. From there they were taken in groups of a thousand, on foot, exhausted and totally destitute, along the old Vienna road to the German border, 200 kilometres away. Born was to write later: ‘The old Wiener Landstrasse became a scene of horror, a symbol of man’s inhumanity
and hatred. Forty columns each of a thousand deportees set off for Germany, on this road that led to death and destruction’.\textsuperscript{192}

Born did all he could, but was unable to prevent this final deportation. Yet the delegation was able to distribute some supplies along the way to the deportees, who otherwise had nothing; and it managed to prevent the final columns from leaving, thereby saving more than seven thousand people.\textsuperscript{193}

Despite the homicidal fury shown by the Nazis and their Hungarian lackeys even as the Soviet army arrived at the gates of Budapest, it would seem that the protective signs put up by Born were generally respected and that most of the people in the places under his protection escaped deportation. There were, however, some grave incidents: for example, 154 people, including 130 patients, were murdered by Arrow Cross militants at the Jewish hospital in Varosmajor utca on 14 January 1945;\textsuperscript{194} this showed only too clearly the fragility of the protection offered by the ICRC delegation and the limits to what it could achieve without an international convention to provide a basis for its work.

Thanks to his daring initiatives – which at times caused some alarm to the Committee in Geneva – and to the changed circumstances which forced Horthy and some of his ministers to present a more humane face to the Allies, Born succeeded in saving the lives of thousands, perhaps tens of thousands, of victims of persecution.\textsuperscript{195}

Yet these rescue operations carried out in particularly desperate conditions, and others, on a smaller scale, by delegates in Croatia, Slovakia and Romania, cannot conceal the cruel fact that millions of men, women and children did not escape.\textsuperscript{196}

However many thousands or tens of thousands of lives the ICRC and its delegates managed to save through their diplomatic approaches and ingenuity in the field, neither they nor any other organization were able to preserve entire communities from deportation and ruthless murder.

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Concentration camps had been opened in Germany as early as 1933. World opinion had not been particularly concerned about them, considering them to be an internal matter of the Third Reich. The camps’ first inmates were the Nazi regime’s political opponents, real or imagined.

Following the German army’s victories at the start of the war a great many suspects were arrested in the annexed or occupied territories and likewise sent to the camps.

From 1942 onward some of the concentration camps, in particular Chelmo, Belzec, Sobibor, Treblinka, Majdanek and Auschwitz, were converted into veritable extermination centres.

Apart from a few penal law prisoners, the people there were held either for security reasons or as a result of Germany’s racial policies; all of them were incarcerated without trial. The concentration camps were under the exclusive
control of the Reich Security Services, and everything about them was shrouded in the utmost secrecy.

As early as 1933 the International Committee had approached the German Red Cross – very tentatively, it must be said – on the subject of the camps. In 1935 Carl Burckhardt had visited the camps at Lichtenburg, Esterwegen and Dachau. A further visit was made to Dachau in 1938. But as the visits could not take place on a regular and systematic basis, and fearing that they were more useful to Hitler’s propaganda machine than to the detainees, the ICRC had decided not to continue them.\(^\text{197}\)

In the summer of 1940 the Committee interceded on behalf of Dutch hostages – for the most part of Asian origin – who had been arrested in the Netherlands in retaliation for the internment of German nationals in the Dutch East Indies and then deported to Buchenwald.\(^\text{198}\) Again, in the autumn of 1941, the ICRC intervened with the German authorities on behalf of Spanish refugees who had been employed in foreign workers’ units attached to the French army, captured during the battle for France, sent to a POW camp and later transferred to Mauthausen concentration camp.\(^\text{199}\) Similar approaches were made for other clearly defined groups of people, such as former members of the annexed countries’ armed forces, officers released from POW camps and arrested again as civilian detainees, hostages, and civilians interned as a retaliatory measure. The ICRC’s aim was to identify specific categories of people for whom it was possible to claim a particular status, and prevent their absorption into the concentration camp system. But even when the ICRC succeeded\(^\text{200}\) – and this remained an exception – the number of people involved was pitifully small when compared to the total number of detainees.

On 30 March 1942 the ICRC instructed its delegation in Berlin to find out discreetly from the relevant authorities whether relief parcels could be sent to Jewish internees at Compiègne camp in France. On 16 April the delegation was instructed to contact the Foreign Ministry to enquire into the whereabouts of Jews who had been transferred from France to eastern Europe and ask whether parcels could be sent to them.\(^\text{201}\)

The Wilhelmstrasse turned down these requests, declaring them inadmissible. The ICRC’s head of delegation, Dr Marti, reported to Geneva on 20 May: ‘Dr Sethe regrets he must give a negative reply: these Jews were deported for acts against the security of the German army; they are not considered as internees, but as criminals, and as such they are outside our supervision ...’. Disillusioned, Marti added: ‘We could have seen that coming ...’.\(^\text{202}\)

The ICRC also tried to reach the detainees by making enquiries about the place and conditions of detention of individuals arrested in occupied territory, asking if they could correspond with their families and receive parcels. Most of these enquiries, which were compiled and submitted by the Agency’s CID Service, remained unanswered.\(^\text{203}\)

On 20 August 1941 the German Red Cross asked the ICRC not to send it any more enquiries, while the war lasted, about detainees in concentration
As indicated above, on 29 April 1942, the National Society announced that it could no longer supply information about non-Aryan detainees transferred from occupied territories and, on 20 August, it said it could answer no further enquiries about non-Aryans in the occupied territories. The ICRC thus found itself denied any information whatsoever about people held in concentration camps. From then on the German Red Cross and the relevant authorities responded only to individual enquiries concerning prisoners of war and civilians of enemy nationality who were in Germany at the outbreak of the war.

The refusal of the German Red Cross to co-operate deepened the ICRC’s misgivings. Throughout the spring and summer of 1942, increasingly alarming information about the plight of the Jews had reached Geneva. It was too little to give any real idea of the systematic extermination plan which the Nazi leaders had decided on in January of that year, and which was kept strictly secret, but the reports were sufficiently detailed and similar in content to reveal the existence of a concerted policy: in Germany, France, the Netherlands and elsewhere, Jews were being taken from their homes, gathered at assembly points where they were stripped of their possessions, then sent eastwards in overcrowded convoys to camps and never heard of again.

The name of Auschwitz (spelt ‘Hauswitz’) first appeared in a file memo dated 2 June 1942, then in a letter from the Slovak Red Cross dated 9 June (received in Geneva on 8 July), and again in a report, dated 7 July, from the French Red Cross, but no intimation was given in those documents that the place might be an extermination camp. In a letter dated 7 August, the British Red Cross asked whether it was true that all Jews from occupied countries were actually being deported to Poland.

On 24 September 1942 the Committee made its first general approach on the subject of the concentration camps, asking its delegation in Berlin to hand a note to the Reich Ministry of Foreign Affairs.

In the note, the ICRC recalled that the Reich had on several occasions drawn its attention to the situation of German nationals who had been arrested for security reasons in countries at war with Germany, and that ICRC delegates had been allowed, in Britain and the United States, to visit such people in their actual places of detention.

It added that it was anxious to pursue these activities, which were in conformity with its customary policy and with the mandates entrusted to it by the International Conferences of the Red Cross, and wished to ensure for this category of persons the facilities provided for them by the extension to civilian internees of the 1929 Convention relative to the treatment of prisoners of war, and by the provisions of the Tokyo Draft.

The ICRC went on to point out that it had received similar requests concerning people arrested by the German authorities in the occupied territories, and stressed that its activities on behalf of German nationals had been possible only on the basis of reciprocity, which obliged the ICRC to take care of all war victims without any distinction whatsoever.
For that reason it was submitting the following proposals with regard to persons arrested in occupied territories and then deported to Germany:

1. Information should be provided about the detainees, enabling the ICRC to inform their families.
2. The detainees should have the opportunity to write to their families.
3. The families and the National Red Cross Societies should have the possibility of sending parcels to the detainees.
4. ICRC delegates should be authorized to visit the detainees.

In closing, the ICRC emphasized that its absolute neutrality obliged it to obey the same principles in all countries and in all circumstances, and to ask from everyone the same facilities to accomplish its task.

In a covering letter addressed to the Berlin delegation, the ICRC set out the negotiating procedure to be followed and explained its underlying concerns. Specifying that its proposals covered both Jews and non-Jews arrested in the occupied territories, it mentioned the many individual enquiries it had sent to the German Red Cross, most of which had remained unanswered, and expressed its conviction that it had to do more:

In our opinion, however, this problem is much too serious to be dealt with solely by individual inquiries. The wave of arrests and deportations, especially in France, poses a humanitarian problem from which the International Committee of the Red Cross cannot dissociate itself. For the International Committee, those persons are civilian nationals in the hands of an enemy.

The ICRC ended by saying it believed that by advancing the principle of reciprocity, it had chosen the best possible argument.208

Dr Marti immediately carried out Geneva’s instructions. At every meeting with Foreign Ministry officials he drew their attention to the note of 24 September, but to no avail. By December 1942, the Committee had given up expecting a written reply, which clearly would have been negative.209

Documents published after the war show that the leaders of the Third Reich believed that complete uncertainty about the fate of arrested people was essential to maintain the reign of terror imposed to discourage any hostile acts by the population of the occupied territories. Even though Hitler’s *Nachricht und Nebel* (Night and Fog) decree of 9 December 1941 did not apply to all internees, the contagious atmosphere of secrecy, coupled with the fact that no official wanted to risk being accused of weakness for having been lenient towards certain detainees, resulted in information on virtually any inmate being suppressed.210

In reply to the ICRC’s repeated representations, the German authorities consistently stated that the persons detained in concentration camps were criminals who were held for security reasons, not because of their nationality but because they had committed acts hostile to Germany.211 They insisted that the ICRC had no authority to intervene on their behalf.

The ICRC maintained its pressure, seeking as a priority to provide the camp inmates with material assistance which, according to appeals reaching
it by indirect means, was urgently needed. At last, in the spring of 1943, the German authorities agreed to allow individual parcels to be sent to prisoners whose names and addresses in the camps were known. However, those same authorities refused to disclose where deportees were being held and failed to answer the ICRC’s enquiries. It was a hollow concession.

All the Committee had to work on were the names and camp addresses of fifty detainees: in June 1943 it sent each of them a food parcel and during that summer received over thirty receipt forms, signed by the addressees. It thereupon set up a special unit – the Service des colis aux camps de concentration (CCC, or Concentration Camp Parcel Service) – with the aim of gradually increasing the number of beneficiaries in the camps. Thanks to first-hand reports by a few camp inmates who managed to escape, information from prisoners of war who were in contact with civilian detainees, interviews between delegates and camp officials, but above all the fact that detainees who shared a single parcel each signed the receipt before returning it, the Concentration Camp Parcel Service was able to gather information on a steadily growing number of internees. By 1 March 1945 the ICRC had collected the names of 56,000 detainees; by the end of the war this figure had risen to 105,000. In the summer of 1944 the ICRC went a step further and began sending collective relief consignments, particularly medicines, without waiting for permission (which was not given until later).

To step up this operation, funds and supplies were needed. The ICRC felt that the receipts signed by the camp inmates were sufficient proof that the relief consignments were indeed reaching their intended recipients, and therefore asked the British government to allow it to import food from overseas to make up the parcels. The authorities in charge of the blockade, however, did not share this view: they felt that without visits by ICRC delegates, there remained an unacceptably high risk of misappropriation, as camp guards could force the detainees to sign the receipts and then take the parcels away from them. They consequently forbade both the import of supplies and the transfer of funds. The Committee, using money it had collected in Switzerland, was obliged to make its purchases within Europe, where essential goods were in desperately short supply. It was only at the end of 1944 that the War Refugee Board in Washington provided the ICRC with significant relief stocks.

Despite these limitations and the obstructiveness of the German authorities, the ICRC managed to send the detainees in the concentration camps a total of 1,631,000 parcels, equivalent to 6836 tonnes of relief. Given the conditions in which this operation was carried out, some losses were inevitable. The ICRC was, for instance, forced to suspend its shipments to Mauthausen after learning that supplies were being diverted. Other camps could not be reached. But, from testimony given either during the war or after the inmates’ release, it appears that most consignments did reach the victims, for whom they were a major morale-booster.
But the vast majority of prisoners could not be assisted in this way, for the ICRC was not allowed to send parcels to those categories of concentration camp inmates who were subject to the most stringent regime, and whose names were a closely guarded secret. Moreover, relief parcels offered no protection against torture and killing. So while trying to extend its assistance programme to ever more detainees, the ICRC maintained its efforts to win permission to visit the camps – or at least some of them. This was vital for any attempt to protect the prisoners, as well as being the *sine qua non* for any large-scale relief operation.

It met with a flat refusal.\(^{219}\) The German authorities were adamant that the concentration camp inmates were criminals who came under the sole responsibility of the Reich Security Services, and that the ICRC had no right to intervene on their behalf. It was not until the autumn of 1944, when the Allied armies were closing in, that conditions for any real negotiations on the fate of the civilian prisoners were restored.

On 2 October 1944 the ICRC sent a note to the Reich Ministry of Foreign Affairs requesting that foreign detainees, whatever their nationality, their place of internment and the grounds for that internment, be given the benefit of certain fundamental guarantees for their safety and treatment.

The Committee emphasized its concern for all civilians detained and cut off from their country, saying that it considered it should do everything possible for their benefit in a manner similar to its action for prisoners of war and interned civilians, and asked the German government to grant it the following facilities as soon as possible:

a) authorization for ICRC delegates to visit concentration camps and other places of detention containing political detainees not of German nationality;

b) authorization to distribute food, clothing and medicaments to those detainees, according to their needs as ascertained by ICRC delegates;

c) lists of the names and addresses of the detainees referred to, to be drawn up and transmitted to the ICRC.

The ICRC ended by underscoring the urgency of these measures which, it pointed out, represented only a small part of the privileges granted to civilian internees in belligerent countries, and it asked the authorities to reply as soon as possible.\(^{220}\)

In an accompanying letter, addressed to Reich Foreign Minister von Ribbentrop, President Huber re-emphasized the ICRC’s special interest in the question of civilian detainees, recalled the work carried out by the ICRC on behalf of German nationals interned for security reasons in countries at war with Germany, and stressed that the International Committee was ‘the only institution capable of providing these foreign detainees with moral and material support, however slender compared to that afforded to prisoners of war and civilian internees’.\(^{221}\)
The ICRC thereupon informed the governments of Britain and the United States, in a memorandum dated 16 October, of its latest approach to the Reich Foreign Ministry, and asked for pledges from both countries that they would grant guarantees similar to those now requested by the ICRC from the German government to any German civilians who fell into their hands, whatever judicial proceedings might be instituted against such persons. The ICRC believed that if the Allies agreed to that course of action, the representations it would then renew in Germany would stand a better chance of success.222

The strategy is clear: the ICRC was trying to secure German agreement to certain immediate concessions for the benefit of the concentration camp inmates, against the promise of similar measures to be applied by the Allies as and when they interned German nationals. It was a form of anticipated reciprocity.

On 9 December President Huber sent another letter to von Ribbentrop. Keen to reach agreement as soon as possible over the protection of civilians, Huber suggested a meeting in Geneva of ‘plenipotentiaries of the governments concerned to reach agreement through the International Committee of the Red Cross – without direct discussions – on a temporary *modus vivendi* for everything connected with civilians in the hands of an enemy’. He stressed, however, that the ICRC attached ‘the greatest importance to the fact that the examination of the proposals submitted to the German Government in its note of 2 October 1944 should in no way suffer any delay’.223

There was no reply.

However, Germany’s military setbacks led to cracks in the Nazi hierarchy. While some fanatics, blindly following the Führer’s destructive obsession, were prepared to plunge the whole world into the cataclysm now engulfing the ‘Thousand-year Reich’, other leaders tried to distance themselves from the party’s extremist positions, either so as to present themselves to the Allies as valid negotiators, or merely in a last-ditch attempt to escape the imminent retribution for their hideous crimes that was heralded by the progressive defeat of the German army.

In order to escape blame for the regime’s atrocities, some senior officials were now ready to give assurances which they would have condemned as signs of weakness when victory seemed assured. This, combined with the disintegration of the Nazi administration, opened the way for concessions which the ICRC had long striven to obtain.

On 1 February 1945 the Reich Foreign Ministry at last replied to the proposals made by the ICRC on 2 October the previous year. It said that the following measures had been taken on behalf of French and Belgian nationals held in the concentration camps: they were authorized to correspond with their families on Red Cross forms; they could receive relief in the form of individual or collective parcels from the ICRC; and detainees against whom judicial proceedings were taken would be notified of the charges against them. To draw up lists of detainees’ names was considered superfluous, since
the ICRC and the families would be informed of their names via the Red Cross messages; the authorities would nonetheless reply to individual enquiries. The question of the detainees’ repatriation was said to be under consideration. But on one major point, the German authorities gave a categorical refusal: they would not allow the ICRC access to the concentration camps: ‘For imperative reasons of national security, visits to camps and other places where those detainees are held are unfortunately not possible.’

For the ICRC, the reply was unacceptable since it concerned only French and Belgian detainees, and above all because it ruled out any direct contact with the inmates. Nonetheless, it was the first break in the wall of secrecy surrounding the camps; it was now up to the ICRC to force open that breach a little wider.

In its reply dated 15 February, the ICRC took note of the assurances given by the German authorities and welcomed their letter as a ‘notable advance’ in the status of political detainees; it asked, however, for further information and made new requests. In particular it suggested that the detainees should fill in identification cards, asked to be given details of the location of the camps and the numbers held in each, called for judicial guarantees for the inmates similar to those stipulated in the 1929 Convention for prisoners of war, and proposed that repatriation of the internees – first the women and children and then the aged and the sick – should start as soon as possible. The ICRC also reiterated its request that its delegates be allowed to visit the camps, ‘with a view in particular to making practical arrangements for the despatch of relief and the transmission of news’, stressing that it was on this very point that it had received assurances of reciprocity from the governments holding German civilians in custody. In closing, it again asked that an official German representative be appointed to negotiate these matters with it.

Given the growing disarray spreading through the German administration, it was indeed essential to establish contact with those directly responsible for the running of the concentration camps: the Reich Security Services. The ICRC tried to arrange a meeting with Himmler, the head of the Security Services, but as he had just been appointed commander-in-chief of German forces on the Vistula front, he designated his deputy, SS General Kaltenbrunner, for the talks.

On 12 March 1945 a meeting took place at Feldkirch in Austria between Professor Carl Burckhardt, ICRC President since the beginning of the year, and Kaltenbrunner, the man directly in charge of the concentration camps.

This meeting was of decisive importance for the ICRC’s subsequent work for the victims of the camps. The two men discussed the release of French and Belgian civilians in exchange for interned German civilians, food supplies for the camps, the transfer to hospital of Polish prisoners of war together with women and youths detained after the Warsaw uprising, and the transfer of Jewish civilian internees to Switzerland. But the key issue in the negotiations was the ICRC’s access to the camps.
Kaltenbrunner maintained that imperative reasons of national security prevented visits to the camps by ICRC delegates. He said that as the prisoners were employed in the Reich’s war industries, they could not be allowed to meet ICRC staff unless the delegates agreed to remain in the camps until hostilities ended; the delegates admitted to the camps would be able to speak to other members of the ICRC’s delegation in Germany, but only in the presence of German officers. In other words, the delegates would themselves have to become hostages.

Well aware of what was at stake – above all the risk that to eliminate any trace of the crimes they had committed, the SS might simply kill the survivors of the camps – President Burckhardt decided to accept this unprecedented demand.227

Further meetings, aimed at implementing the agreement as quickly as possible, followed in Constance on 10 April and Innsbruck on 24 April between Hans Bachmann, Burckhardt’s deputy, and an emissary of Kaltenbrunner.228

But time was running out: the collapse of the Reich which had helped bring about the concessions might now prevent them from taking effect.

The ICRC therefore did not wait for Kaltenbrunner’s written agreement, which was not sent until 29 March.229 It had been holding parallel discussions with the Allies on obtaining the necessary means for a large-scale rescue operation – food, clothing, medicines, trucks, fuel, spare parts, and so on – and decided to act immediately. Accompanied by the delegates who were to stay in the concentration camps and those who would escort the released prisoners, the first convoys crossed the German border on their way to those camps that were still accessible.

With all the means it could muster, the ICRC set out to get urgently needed supplies to the concentration camps, where unspeakable deprivation prevailed; returning to Switzerland, the trucks carried released prisoners.230

The first operation carried out under the agreement with Kaltenbrunner was the repatriation of women inmates from Ravensbrück camp. A delegate arrived there on 30 March, but it was not until 5 April that he was able to leave the camp with a convoy of ICRC trucks carrying 300 women deportees, arriving in Switzerland four days later.231 Before hostilities had ended, about 5,500 deportees were evacuated to Switzerland, France and Sweden in this way.232

However, the crucial question of installing the delegates in the concentration camps remained unresolved; at Mauthausen, Dachau and Ravensbrück the delegates found the gates resolutely barred to them. Desperately trying to conceal their crimes, the camp commandants claimed they had received no confirmation of the agreement reached with Kaltenbrunner, and refused to let the ICRC in. The situation was all the more alarming as there was every reason to fear either a hasty systematic extermination of the camp inmates, or their mass transfer in horrifying conditions, following the grim example set by the evacuation of the camps in Poland and East Prussia.
It was not until the closing days of the war that ICRC delegates succeeded in entering the camps of Türckheim (Landsberg), Dachau, Mauthausen (which was also responsible for the Gusen camps) and the ghetto city of Theresienstadt. Their presence in the camps served to prevent last-minute executions and to negotiate the surrender of the guards when the Allies arrived so that the inmates, nearing the end of their appalling ordeal, did not fall victim to the final clashes between their oppressors and their liberators.233

Thus, timely intervention by the delegate Louis Haefliger brought about the cancellation of an order to blow up the Gusen underground aircraft factory, along with some 40,000 detainees working there.234

On the other hand, however, the delegates were unable to prevent the evacuation of Oranienburg and Ravensbrück, which went ahead under horrendous conditions: columns of wretched, emaciated prisoners were herded onto the roads with nothing to eat and forced to trudge along until they dropped; they were at the mercy of guards who did not hesitate to kill those who, through exhaustion or sickness, were unable to keep up. All the delegates in northern Germany could do was to try to keep the captives fed at the roadside, using supplies from the ICRC’s stores at Lübeck. During the final hours of Germany’s débâcle, the ICRC’s white trucks moved constantly to and fro to provide food for the endless columns of deportees, along roads that were becoming increasingly congested with fleeing civilians and soldiers. By their presence, the delegates curbed the violence of the guards and gave the prisoners hope. On their way back to base, the ICRC’s trucks were used to ferry sick and exhausted prisoners.235

So in the death throes of Nazi Germany, the ICRC was finally able to take advantage of the chaos to enter certain camps and provide some measure of assistance and protection for the survivors.

What conclusions can be drawn from the ICRC’s work on behalf of civilians in enemy hands?

Clearly, the negotiations in aid of nationals of belligerent states who were on enemy territory at the start of hostilities proved successful. Throughout the war, the ICRC was able to do the same to assist and protect them as it did for prisoners of war.

On the other hand, it was prevented from protecting the victims of deportation and racial persecution. When the full horror of the concentration camps was finally revealed, the ICRC found itself at the centre of a storm of protest: it was accused of not having tried hard enough to help the victims and of failing to speak out against atrocities which it must have known about in some way or other.

This question must be examined, because it highlights the limits and constraints of humanitarian work.
It has to be admitted that while its perseverance brought hope to thousands of detainees, and the courage, determination and inspiration of its delegates helped to save thousands of lives in the final months of the war, the Committee failed tragically in its endeavours: after atrocious suffering, millions of people were murdered in cold blood. The ICRC remained unable to protect them.

This failure is shared by the Red Cross as a whole, and indeed by all mankind. But it particularly concerns the ICRC because of its specific mission and its position within the Red Cross movement. Never before had its guiding principles been so devastatingly held in contempt.

There can be no doubt as to the causes of this failure: they lie in the racial hatred and destructive obsession of the Nazi leaders, in the blind obedience of much of the German population and in the active support of thousands of fanatics, which enabled the murderous plans of the Reich’s leaders to be carried out with total disregard for any moral values.

Confronted by the monstrous determination of the Nazis, who had the resources of a major totalitarian state at their command and whose arrogance was inflated to unprecedented levels by a series of astounding military victories, the International Committee found itself virtually powerless.

Furthermore, civilians in enemy hands were entirely unprotected by international law. It would be naive to imagine that the leaders of the Reich would have felt restrained by any legal barriers, but the existence of a convention protecting civilians would at least have given the ICRC a sorely needed basis for its intervention. Each time the ICRC tried to raise the question of civilians detained in occupied territories, the German authorities replied that it was none of its business.

This left the ICRC with two options: either to take a pragmatic approach, trying to secure concessions which allowed it to provide some measure of protection and assistance to people arrested, or to adopt a public stand, attacking the very principle of arbitrary arrests, racial oppression and the concentration camp system.

The first approach was in conformity with the ICRC’s traditional practice. It achieved results which, though totally disproportionate to what was at stake, cannot be simply brushed aside: even one life saved is priceless. Nevertheless, this sort of approach called for discreet and patient diplomacy, relying on repeated representations to make gradual progress towards new concessions. But discretion could easily be mistaken for inaction, patience for indifference. In point of fact, it was only in the final days of the conflict that the results even began to match up to the efforts that had been made.

Seeing that it was not obtaining the facilities it needed to develop its activities, should the International Committee not have broken its silence and denounced the crimes it was unable to prevent? This question was pivotal to the serious accusations against the ICRC after the war and must therefore be examined.
Only total ignorance of the history of the Third Reich and of its leaders’ fanaticism could possibly lead anyone to think that the Nazi warlords would have bowed to the injunctions of an organization whose only means of pressure was its moral authority. Knowing that the extermination of the Jews was carried out despite the urgent need for manpower in the Reich’s war industries, knowing too that in the spring of 1944, Eichmann had little difficulty in obtaining transport and fuel for the deportation of Jews from Hungary even though the Wehrmacht desperately needed both to fight the war, one would have to harbour immense illusions to believe that moral pressure, or even outright condemnation, could have stopped the destructive forces set in motion by the Third Reich. German public opinion, largely indoctrinated by Nazi propaganda, was either muzzled or mute. Neutral states had no political power. As for the Allies, they had no need of statements by the ICRC to reinforce their determination to end the Nazi reign of terror. And in any case, the ICRC – whose delegates were barred from entering the concentration camps – had no information which was not also accessible to the Allies themselves.

Force alone could halt the genocide. But for a long time, Germany held its ground against the rest of the world.

As things stood, public condemnation would have had little practical effect. It might have shielded the ICRC from the criticism it later suffered, but it would have done nothing for the victims.

However, saying this does not answer the question. Indeed, if the most heinous crimes are not condemned, if repeated atrocities are not denounced as such, even though no punitive measures can be taken against their perpetrators, there is every reason to fear that moral values will eventually disintegrate. It follows, therefore, that in certain circumstances public condemnation is necessary in itself, quite apart from any practical results it may achieve.

In the case in question, however, public condemnation would most probably have resulted in blocking any further negotiations with the German authorities, and consequently destroying any chance of helping the victims of persecution.

This was the dilemma faced by the ICRC: could it risk forfeiting all hope of providing practical assistance by making a public protest, whose effects were doubtful? In the final analysis this is a question of ethical values, which cannot be decided by historical research and on which opinions may vary.

The ICRC itself believed that it should not jeopardize its possibilities of giving practical help by speaking out, knowing that it alone might subsequently be able to provide that help; nor could it, for highly uncertain results, compromise its ongoing activities to protect prisoners of war, under the mandate assigned to it by the international community:

The International Committee could do no more than persuade, not having the powers which all too frequently it is thought to have: its force is only moral.

It has on many occasions seen how public protest – sometimes demanded by public opinion – is useless and even likely to endanger what good the Red Cross is
able to do. So it holds to its view that its primary duty is to provide practical help wherever it can.

Consequently, in its efforts to help German concentration camp inmates, the International Committee kept in close touch with political developments and seized every opportunity to obtain results which, however slight by comparison with the hardship it sought to alleviate, it alone was able to achieve. In that way, it gradually prepared the negotiations which, towards the end of the fighting, opened the gates of certain concentration camps to its delegates and its lorries.240

Yet the question whether the ICRC did do everything in its power to protect the victims of Nazi persecution remained. It was at the root of the criticisms levelled at the ICRC after the horror of the genocide became known; but it must also be said that the ICRC itself has not failed to question its own attitude, and its own actions, in relation to that unprecedented human tragedy.

Determined to shed light on this chapter of its history, the ICRC decided in July 1979 to ask a Swiss historian of international academic renown to look into what the Committee actually knew about the ‘final solution’, and what it wanted – and was able – to do for the victims. It was agreed that he would have unlimited access to the relevant ICRC records and would retain complete control over the form and content of his work, which would be conducted without any supervision or censorship by the ICRC.

The person chosen by the International Committee was Jean-Claude Favez, Professor of Modern History and former Dean of the Faculty of Arts at Geneva University.

The Committee also agreed to open its archives to a survivor of the concentration camps, the Israeli lawyer Arieh Ben-Tov, who wanted to write a book about the ICRC and the Jews in Hungary.

Professor Favez’s work, entitled Une Mission impossible?, and that of Attorney Ben-Tov – Facing the Holocaust in Budapest – appeared within a few weeks of each other in the autumn of 1988.241

These two studies led the ICRC to reassess its work on behalf of the victims of Nazi persecution.

With regard to Germany, Poland and the Eastern Front, the ICRC concluded that, half a century later, it could still do no more than record its impotence:

In view of the determination – as it is known today – with which the Nazis pursued their policy of systematic annihilation of the Jews and considering the constant rejection by the Nazis of any gesture in favour of Jewish individuals, the ICRC, even now, doubts that it would have been able to exert any decisive influence on the fate of these people in Poland, in the occupied territories of the USSR or in the territory of the Third Reich.

Conversely, the ICRC felt that if it had taken more rapid and resolute action in the other territories under Axis influence (occupied, allied and satellite),
and given greater encouragement to its delegates in the field, it would proba-
bly have saved more lives: ‘One can say, with hindsight, that in some coun-
tries where the domination of the Third Reich was not total, the ICRC could
probably have saved more Jewish people than it did.’242

7. The protection of the civilian population against
bombardment

‘Whereas warfare was formerly waged between armed forces, it is now
finding its victims, to an increasing extent, among civilians. Almost daily,
odies of innocent women and children are being shattered and destroyed
through the bombing of open cities’, declared Norman Davis, Chairman of
the Board of Governors of the League of Red Cross Societies and President
of the American Red Cross, speaking in London in June 1938 at the opening
of the Sixteenth International Red Cross Conference.243

The Second World War was to confirm Davis’s sombre prediction. The
bombing of Warsaw in September 1939 showed once again the vulnerability
of large cities to air attacks; it was followed by raids on Rotterdam, London
and Coventry, Cologne, Hamburg, Dresden, Berlin, Tokyo, Hiroshima and
Nagasaki, and many other cities and towns. Both the Germans and the Allies
believed that the bomber would achieve victory; this belief led to ever greater
and ever more murderous raids against enemy urban areas, culminating in
the use of the ultimate weapon, capable of wiping out, in a flash, a city that
had stood for centuries.

The bomber radically transformed military strategy by allowing strikes
deep into hostile territory; it became easier to attack the enemy’s factories
and urban centres than his armed forces. From the smoking embers of cities
and towns rose the choking vapour of total war.

International law seemed incapable of stopping the process. Indeed, the
rules forbidding the bombing of undefended towns dated back to the time
when aviation was as yet in its infancy.244

There were two possible means of addressing this problem. The first was to
reach agreements establishing neutral safety zones in which all military activ-
ity would be prohibited and where anyone not or no longer taking part in the
fighting or in military production could seek refuge – wounded and sick sol-
diers, women, children, the elderly, the disabled. However, such agreements
were difficult to draw up, for they covered very sensitive subjects such as the
marking and identification of the areas to be included and supervision of the
zones to prevent any misuse. Furthermore, in creating such zones protected
by special agreement, there was a risk of undermining the principle of general
immunity for all non-combatant civilians.

The second was to reaffirm the principle of general immunity for the civil-
ian population by condemning attacks on undefended cities and towns.
The International Committee tried both approaches, with an equal lack of success.

In the inter-war period, various organizations had sought to lay the foundations for a general agreement for safety zones. A Commission of Experts, convened by the ICRC in October 1938, had prepared a draft convention on the institution of hospital towns and localities in time of war. The Swiss government had sent the draft to governments invited to take part in the Diplomatic Conference scheduled for the spring of 1940; the outbreak of war prevented the conference from taking place.

But the ICRC remained convinced of the vital humanitarian importance of the draft. On 9 September 1939 it sent the belligerent governments a memorandum recommending the conclusion of *ad hoc* agreements establishing both hospital zones and localities to shelter the sick and wounded of the armed forces, and safety zones to provide refuge for civilians taking no part whatsoever, not even indirectly, in the fighting. It raised the subject once more in a memorandum dated 21 October 1939, in which it again offered its help in bringing about an agreement between the belligerents and proposed establishing direct contact, in neutral territory, between representatives of the countries at war.

The ICRC was obliged to abandon these efforts, as its proposals received no response. Meanwhile the terrifying escalation of aerial warfare was taking an ever heavier toll among the civilian population. The ICRC therefore appealed to the belligerents again on 15 March 1944, beseeching them to set up safety zones for the wounded and sick — both military and civilian — and for civilians taking no part in the fighting and making no contribution to the war effort, especially children, the elderly, pregnant women and women with young children.

Despite the particularly earnest nature of this appeal, it failed to have any practical effect. However, the difficulties that stood in the way of any agreement on safety zones must be borne in mind. They included the problem of delimiting habitable areas situated away from roads, railways and war industries, of making the neutral zones clearly recognizable both by day and by night and defining who would be allowed to take refuge there, of setting up supervisory measures to prevent the zones from being misused and of giving adequate guarantees to the other side... Even in peacetime, these were considerable stumbling blocks. In war, they appeared insurmountable. In fact, not one safety zone was created as a result of an agreement between the belligerents.

In seeking to limit the effects of the bombing, the only other possible course of action was to insist on the principle of general immunity for the civilian population.

On 12 March 1940, the ICRC sent an appeal to the governments of states party to the Geneva Convention and the IVth Hague Convention of 1907, as well as to the National Red Cross Societies. It stressed that the new means of waging war, in particular the use of bomber aircraft, had not altered the
basic principles underlying the humanitarian conventions, especially that of the general immunity conferred on the civilian population by international law. It then pointed out that the IVth Hague Convention of 1907, in which this principle was enshrined, forbade the attack or bombardment, by whatever means, of undefended towns or dwellings. In the absence of any law providing for the creation of safety zones, the ICRC urged the belligerents to reach bilateral agreements which would uphold the general immunity of the civilian population, state that the only legitimate targets were military objectives (and define the meaning of the term), forbid any attack on the civilian population as such – in particular, bombardment for the purpose of intimidation – and acknowledge that an act of destruction must not, in any circumstances, cause harm to the civilian population that was excessive in relation to the military importance of the actual target. The ICRC also called for the establishment of an enquiry procedure to deal with alleged violations of humanitarian law; it urged belligerents not to take reprisals, and stressed that people protected by the red cross emblem should under no circumstances be attacked, even as a retaliatory measure.251

The ICRC renewed its appeal on 13 May 1940, three days after Germany launched its offensive against the Netherlands, Belgium, Luxembourg and France.252 This, too, fell on deaf ears.

Three years passed, during which the bombing of urban areas became increasingly destructive and lethal. On 24 July 1943 the ICRC issued a new appeal to the countries at war, calling on them ‘not to have recourse to destruction which could have no justification and to methods of warfare proscribed by international law and by man’s conscience’.253

A further appeal was made on 30 December 1943, emphasizing that:

... the International Committee has observed with deep and growing concern the continual worsening of methods of warfare which affect, in various ways and in ever greater degrees, the civilian population as well as property having no military significance, some of which is irrereplaceable in terms of our civilization. The principle of the law of nations, which states that legitimate attacks on armed forces and military objectives should not expose people and property unconnected with military purposes to harm and risks that are disproportionate to the importance of the target, appears to be increasingly pushed to one side by the unrestrained pursuit of what has become total war.

The International Committee of the Red Cross has always considered that its duty lies less in making public protests than in bringing practical assistance wherever it can, very often keeping its own counsel in order not to compromise its efforts. However, the exceptional importance of the moral questions and values at stake today force it to speak out.’ 254

While the ICRC’s statements were generally received with approval by the governments, they all too clearly did not bring about any practical steps to limit the harm inflicted on the civilian population. On the contrary, as the belligerents in turn gained air superiority, they used it to strike at urban areas in order to destroy the enemy’s industrial base and the population’s will to
resist. The resultant spiral of violence culminated in the use of the atomic bomb.

Compared with even the most lethal weapons deployed until then, the A-bomb was on a totally different scale. By its virtually unlimited destructive power, its instantaneous ability to annihilate, the near-impossibility for its victims to shelter from its effects and the long-term consequences of its radiation, it marked a turning point without precedent in the history of mankind, a break with the past more brutal than any other temporal event in human memory.

By obliterating any distinction between military objectives and the civilian population, by inflicting atrocious suffering on its victims and making their death inevitable, and by threatening the lives of those who might attempt to assist them, the atomic bomb called into question the very basis of the law of war and the work of the Red Cross. On 5 September 1945, in its 370th Circular to the National Societies, which dealt with the end of the war and the movement’s future activities, the ICRC sought to show the irreconcilability of this awesome weapon of mass destruction with the foundations of humanitarian law and the Red Cross mission. At the same time, the International Committee refrained from making any comment as to the bomb’s legality under the law currently in force:

There can be no doubt that war, an anachronism in a civilized world, has taken on a character so devastating and so widespread ... that the thoughts and labours of all should be turned to the paramount task of making impossible the resort to arms. The Red Cross, nevertheless, is compelled, in time of war, to pursue its traditional efforts in the field of international law, that is to rise in defence of humanity and of the demands that it makes. At a moment when peace seems, at last, to have returned, it may appear ill-timed to take up such a task, but that should not deflect the Red Cross from this fundamental duty. As the destructive forces of war increase, so much the more imperative does it become to protest against this overthrow of human values and to turn the light of man’s conscience, frail though it be, to pierce the darkness.

It is indeed questionable whether the latest developments of the technique of warfare leave any possibility for international law to cover a firm and sound order of society. Already the First World War, and still more the long disaster of the past six years, demonstrate that the conditions which prompted the framing of international law in its model form in the Geneva and Hague Conventions, have undergone far-reaching change. It is clear that developments in aviation and the increasingly destructive effects of bombing have made practically inapplicable the distinctions hitherto drawn, whereby certain classes of people had by right a special protection (for instance, the civil population in contrast to the armed forces). The inevitable development of weapons, and so of warfare as a whole, has a greater significance by reason of the exploitation of the discoveries in nuclear physics, which permit the producing of arms of a potency hitherto unknown. It would be useless to attempt a forecast for this new weapon, or even to express an opinion on the prospect that the Powers would relinquish it altogether. The question arises whether they would, perhaps, keep it in lasting and unfailing reserve as a supreme safeguard against war and as a means of preserving a just
This hope is not, perhaps, entirely vain as, during this six-year struggle, there has been no recourse to the chemical or bacteriological means of warfare as outlawed by the Powers in 1925. It is as well to remember this fact at a time when there have been so many infringements of law and so many reprisals have been taken.

In former times war was, essentially, an armed contest between combatant forces. Today, it supposes the total mobilization of all living forces of the nation against the enemy country and it involves the whole population. Warfare has now altered fundamentally owing to recent discoveries and to technical application of them. Mankind is thus faced with a problem of supreme gravity which calls for decisions on the moral plane.

The Geneva Convention gives guarantees to the wounded and sick of the armed forces – just as to their adversaries – that their lives will be protected and that they will have the right to proper care; the Convention on the treatment of prisoners of war watches over the physical and moral situation of those in captivity. The terms of these instruments declare the absolute inviolability of an enemy who is no longer fit for combat and give recognition to the dignity of the human personality. Protection of the civil population must rest on these same principles ....

From totalitarian war have sprung new techniques. Must it then follow that the individual person will no longer enjoy the protection of the law and that he will thus be considered as a mere pawn in the mass struggle? That would mean the collapse of the principles that are the foundation of international law, which affords physical and moral protection to the human person. Even in time of war, a system of law which is purely expedient, based on self-interest and which serves only the exigence of the moment, could never offer an enduring security.

Unless respect for the significance and dignity of man is sustained, war will inevitably lead to boundless destruction, since the human mind which harnesses the forces of the universe seems, by the mechanisms it contrives, to hasten the onrush of destruction.

The Red Cross ideal, however, endures. It embodies the conception of the significance and dignity of man. It then far transcends the law of nations and the laws of war. It is upon that ideal, using the word in its most profound sense, that human society depends for its survival.255

This statement did not prevent the start of the nuclear arms race. Nonetheless, through the International Committee, the Red Cross spoke out unequivocally, less than a month after the annihilation of Hiroshima, on the legal and moral consequences of man’s latest means of destruction.

The ICRC’s position was unanimously endorsed by the Seventeenth International Conference of the Red Cross, which met in Stockholm in August 1948.256

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What conclusions can be drawn from the ICRC’s efforts to protect civilians against air raids?

Technical and industrial progress had transformed the position of the civilian population in wartime, because once material resources had been acknowledged as a decisive factor on the battlefield, industry became an
essential instrument in the waging of war. Battles were won not only at the
front, but also in the mines, factories and workshops. The civilian pop-
ulations ceased to be helpless spectators of wars and became vital auxiliaries
in the struggle for victory. Hence the industrial mobilization that took place
in all the belligerent countries.

For this reason military commanders looked for a weapon that could
destroy the enemy’s industrial potential. They found it in the bomber air-
craft, more effective for striking at cities than for inflicting harm on enemy
forces spread out on the battlefield.

Obviously, the ICRC had no means of preventing or curbing this develop-
ment without the support of the governments concerned. But the govern-
ments of the warring states were hardly likely to refrain from using a weapon
which they relied upon to paralyse the enemy’s industrial output and ensure
victory by destroying morale on the home front. This explains why such
unprecedented violence was unleashed against the civilian population.

In these circumstances, the ICRC’s appeals were like a lone voice in the
wilderness. Did they at least serve to uphold the Law of The Hague’s under-
lying principle that the civilian population is entitled to general immunity? It
is a moot question, for indeed, what value remained in a rule which had been
blatantly ignored for so many years by the leading players in the conflict?

8. Relief operations for the civilian population

The massive deployment of tanks, artillery and aircraft during the war
brought about unimaginable destruction. In most of Europe the countryside
was laid waste by the passage of armies, cities and towns were devastated by
bombing, industrial plant and equipment were destroyed, livestock slaugh-
tered, transport systems left in ruins.

In the occupied territories, the Axis powers requisitioned much of the
available manpower, raw materials and food, sometimes to such an extent
that the population was left without the basic means of survival. Home pro-
duction collapsed because of the mass deportation of workers.

In addition, the economic war was waged with exceptional severity. All
the measures which had been progressively introduced during the First World
War were reimposed outright in September 1939, to be supplemented soon
after by even harsher constraints as each side sought to isolate the other and
to cut its supply lines. Severe quota restrictions were imposed on the neutral
countries’ trade, which was closely supervised. Britain, with its command of
the high seas, played a major role in enforcing the blockade; the entry of the
United States into the war strengthened the Allies’ control over international
commerce, while on the European mainland all trade, even that of the neutral
countries, was controlled by Germany.

The combination of these three factors – destruction, requisition and
blockade – dealt a drastic blow to industrial production throughout Europe.
Economic stagnation, shortages and hunger compounded the damage caused by the fighting itself. Hardest-hit were countries dependent on industry, trade or shipping (such as Belgium and Greece), which even in peacetime had to import a substantial part of their food. Disease due to malnutrition was rampant, with an alarming rise in mortality rates.

But whereas the 1929 Convention guaranteed the right of passage for relief for prisoners of war, there was no similar provision for the benefit of civilians. The rules governing maritime blockades, while trying to protect the rights of the neutral states, placed no limit on the damage which one belligerent might inflict on its enemy’s economy, whatever suffering this might entail. Yet even though the ICRC had no legal basis to work in this domain, it could not ignore the plight of the civilian victims of the blockade.

Any possible risk that its relief work for them might duplicate that of the League of Red Cross Societies, whose particular mission was to co-ordinate the activities of National Societies to help civilians, did not materialize. As both organizations were trying to assist the victims of the war, some form of co-operation had to be found, for Article IX, paragraph 1, of the Statutes adopted in 1928 by the Thirteenth International Conference of the Red Cross, held in The Hague, stipulated that:

The International Committee of the Red Cross and the League of Red Cross Societies shall co-operate in matters affecting the activities of both, and especially in regard to the work of relief organization on the occasion of national or international calamity.²⁵⁷

After carrying out a number of small-scale operations, the ICRC and the League realized that the only effective solution commensurate with the needs was to set up a special relief agency for civilian victims of the war. The Joint Relief Commission of the International Red Cross was therefore created in October 1940.²⁵⁸

This Commission was not intended to become a new Red Cross institution at the international level: its purpose was to carry out relief operations on behalf of the ICRC and the League.²⁵⁹

The League, which had transferred its headquarters from Paris to Geneva in September 1939, offered the services of its secretariat. Although this had long experience in the procurement of relief supplies, its activities had been severely cut back by the war, since the League was unable because of its composition to work in most of the belligerent countries – as several of its senior officials were nationals of countries at war with the Axis, it was clear from the start that Germany would not agree to its working in the occupied territories.²⁶⁰

On the other hand, the position of the ICRC as a neutral and impartial intermediary was almost universally recognized; it could act in most of the countries at war. Moreover, it had delegations accredited in almost all countries and could place their services at the Joint Commission’s disposal. And because of its relief work for prisoners of war, the ICRC enjoyed numerous
facilities – such as exemptions from customs duties and transport charges – which it sought to have applied to the Joint Commission.261

Once the Joint Commission had been created, the framework for its activities had to be established; evidently, the consent of the main belligerents was indispensable. The ICRC therefore opened negotiations with both the Germans and the Allies.

On 11 January 1941, the Reich Foreign Ministry agreed in principle to relief operations for the civilian populations of the occupied territories, subject to the following conditions: the relief must be sent as collective consignments and not as individual parcels; the German Red Cross would be responsible for organizing and supervising its distribution; the relief deliveries would be exempt from customs duties and transport charges, provided they were addressed to delegates of the German Red Cross; the distributions would be carried out by local welfare agencies and according to the donors’ wishes; any requisitions for the benefit of German troops or officials were expressly forbidden; representatives of the donors could be authorized, in individual cases, to visit the occupied territories to convince themselves that the relief supplies were being correctly distributed.262

Britain, on the other hand, was not prepared to give up the advantages it enjoyed from its control of the seas and the use of the blockade as an economic weapon. London’s position was spelt out in a letter, dated 14 September 1940, from the Ministry of Economic Warfare: in the opinion of the British government, it was the responsibility of the occupying power to ensure the food supplies of districts under its jurisdiction; relief deliveries could only ease the burden of the occupying power by allowing it, if not to seize part of the relief, at least to increase requisitions of local produce; the occupied territories would not have been threatened with famine if the invader had not seized all available reserves. Britain was adamant that humanitarian considerations must not obstruct enforcement of the blockade, since in its view only the strictest enforcement would result in shortening the duration of hostilities; an exception would be made solely for medical stores destined exclusively for the needs of invalids and the wounded.263

Despite the ICRC’s negotiations throughout the war, the British government refused to change its basic position on the enforcement of the blockade;264 nor would it permit the transfer of funds to finance relief operations within the occupied territories.265 Certain exceptions were made, however, for specific ICRC operations, as in the case of Greece; this will be discussed below.

The Joint Commission was consequently restricted to carrying out limited operations supported by whatever funds and supplies it could obtain within the blockaded zone.

Its main donors were the governments of the occupied countries (in so far as they had available resources), the governments and general public of the neutral countries, as well as National Red Cross Societies and other charitable organizations.266 Some overseas donors were able to support the Joint
Commission through cash transfers, made via the Bank for International Settlements or the Swiss National Bank.267

Prevented from purchasing on the world market, the Joint Commission had to buy food and other supplies either within the blockaded area, in the neutral countries – particularly Switzerland, Turkey and Portugal – or in belligerent countries that had a food surplus, such as Romania and Hungary. However, as the war continued every country in Europe was increasingly affected by the shortages; those which still did have surplus supplies would part with them only in exchange for goods they lacked, and as the Joint Commission had nothing to offer, it was unable to barter.268

The lack of funds, the scarcity of supplies within Europe and the shortage of transport all became more and more difficult to overcome.

In such circumstances there could be no question of feeding the entire population of countries suffering shortages. The Joint Commission sought to help the most vulnerable groups: wounded and sick civilians, children, pregnant women and women with young children, the elderly, the infirm and the destitute. Relief supplies were generally entrusted to the National Red Cross Societies or other welfare organizations in the occupied countries, to be distributed in civilian hospitals, nurseries, maternity homes, orphanages, shelters and soup kitchens.269 The arrival and distribution of the supplies were verified by means of acknowledgements of receipt and reports sent by the beneficiary organizations; this information was completed by visits by ICRC delegates which, where possible, were made at regular intervals.270

Sixteen European countries received shipments from the Joint Commission, in particular Belgium, France, the Netherlands, Yugoslavia and Poland, and in the immediate post-war period the Commission carried out large-scale relief operations in the defeated countries – Germany, Austria, Italy and Hungary.271

Notwithstanding the enormous difficulties – mainly due to the lack of funds, the scale of the needs throughout hunger-stricken Europe and the destruction of the transport system – the Joint Commission managed to purchase, forward and distribute some 165,000 tonnes of relief (including more than 2000 tonnes of medicines and pharmaceutical products), worth 314 million Swiss francs.272

Independently of the work carried out by the Joint Commission, the ICRC itself mounted a number of relief operations in particularly sensitive circumstances; three should be mentioned here:

The Channel Islands

The British Channel Islands, off the coast of Normandy, were occupied by the German army in June 1940; between then and 1944 the ICRC sent numerous cartons of medicines which had been donated by the British Red Cross. The islanders’ situation deteriorated sharply after the liberation of France and a disastrous local harvest, for as the islands were still occupied by
the Germans, they could not be provisioned from either France or Britain. With the prior consent of the British and German authorities the ICRC set up a relief operation using one of its own ships. During the winter of 1944–5, the SS Vega made five voyages between Lisbon and the island ports of Jersey and Guernsey, carrying 4300 tonnes of food and other relief. An ICRC delegate sailed with the ship each time, to supervise the handover of the supplies to the islands’ bailiffs and to supervise the distributions.273

‘Pockets’ on the Atlantic coast

After the liberation of France, in summer 1944, the German coastal garrisons at Lorient, St Nazaire, La Rochelle, Royan and Dunkirk found themselves surrounded by Allied troops; these ports and the neighbouring countryside were cut off from the rest of France. From autumn onward, the situation of the civilians who had remained there became alarming and so, at the request of the French government, the ICRC agreed to try to get supplies through to them. In each town the consent of the German authorities had to be obtained and a local truce negotiated before the lines could be crossed. The supplies were taken in either by road, by rail (after the track had been repaired) or by sea; ICRC delegates accompanied each consignment to ensure that the food and medicines did in fact reach the civilian population. Some 2300 tonnes of relief were brought in and distributed in the course of seven particularly sensitive and hazardous operations.274

The Dodecanese

The Greek mainland was liberated in October 1944, but the Dodecanese islands remained under German occupation until 8 May 1945. As no supplies could be sent in from outside, the situation of the civilian population soon became catastrophic. With the agreement of the belligerents and Turkey, the ICRC began a relief operation using dhows hired at Izmir in Turkey; the mine-infested waters of the archipelago made the use of larger vessels impossible. The first operation took place in February 1945. However, while the dhows and the delegates were still at Rhodes, Turkey declared war on Germany. The delegates nonetheless obtained the belligerents’ consent for the plan to go ahead, on condition that the dhows sailed under the red cross emblem. Three further operations took place in March, April and May, taking in a total of 2700 tonnes of food, clothing and medicine provided by the British government and various Greek communities abroad.275

These three rescue operations – for the Channel Islands, the Atlantic coast ‘pockets’ and the Dodecanese – had three points in common:

a) They required exceptions to be made to the blockade regulations.
b) The ICRC delegates and supplies had to cross the front lines, either by sea or on land.
c) Stringent conditions were imposed each time, namely that the German authorities had to guarantee in advance that none of the supplies would
be requisitioned for the occupying forces and that the ICRC delegates would be allowed to exercise scrupulous control over the distributions. Modest though they were, these operations nonetheless helped to save the lives of tens of thousands of civilians who, because of the altered military situation, found themselves in desperate straits. Many of them would have starved to death without the intervention of a humanitarian organization whose neutrality was fully accepted by the countries at war.

Without any doubt, however, the ICRC’s biggest relief operation during the war was the one it conducted in Greece from 1941 to 1945.

Greece, which in normal times had to import more than one third of the foodstuffs required for national consumption, was abruptly cut off from its external sources of supply by the Axis occupation in April 1941. To make matters worse, the destruction caused by the war and, in particular, the loss of most of the country’s tractors and draught animals, led to the collapse of farming: from the summer of 1941, agricultural production fell to below half its pre-war level and continued to decline. Furthermore Bulgaria had annexed Thrace and eastern Macedonia, which normally supplied over one quarter of the total Greek harvest, and appropriated their crops for its own use. To cap it all, the Italian and German occupiers seized all available reserve stocks. Disaster was inevitable.

Alerted in the summer of 1941 by its delegate in Greece and by the Hellenic Red Cross, the ICRC immediately contacted the governments concerned. After lengthy negotiations Britain authorized the shipment of up to 50,000 tonnes of food; Turkey gave permission for relief supplies to be bought locally and placed a ship at the disposal of the Turkish Red Crescent. For their part, the occupying powers agreed to allow food imports on condition that ICRC delegates assumed responsibility for their distribution. With funds provided mainly by Greek communities abroad, food supplies were purchased in Turkey, Egypt and the Near East.

Countless problems had to be overcome: there was not enough food available in Turkey and the Near East; delays in obtaining safe-conducts held up shipment of the supplies; the Red Crescent ship sank in the Sea of Marmara during its sixth voyage; a Swedish ship was attacked and sunk by Italian aircraft ... All the same, 45,000 tonnes of food were shipped in during the first eleven months of the operation (from October 1941 to August 1942). However, only 7500 tonnes arrived during the fateful winter of 1941–2: starvation became widespread – the bread ration, which had stood at 320 grammes per person per day in October 1941, dropped to 96 grammes in February 1942 and was no longer distributed regularly. In Athens and several other towns, the death rate rose to four or five times the level of the previous winter.

The arrival of several shiploads of wheat in March 1942 helped to redress the situation; the famine, which it had been impossible to prevent, was finally brought under control.
It was nonetheless clear that the relief operation had to be planned on a completely different scale. Aware of the situation in Greece as early as autumn 1941, the ICRC had set out to convince the countries at war of its gravity and of the urgent need to take action.

This had been the main objective of Professor Burckhardt’s mission to London in December 1941. After long discussions, the British government had agreed, subject to certain conditions, to consider allowing the monthly shipment of 15,000 tonnes of Canadian wheat.

Two vital questions still had to be resolved:

a) how to transport the wheat across the Atlantic;
b) how to provide the guarantees demanded by Britain in exchange for this major exception to the blockade regulations, in particular that the occupying powers would not use the new supplies as an excuse for making further requisitions of Greek domestic production.279

Only Sweden had spare tonnage available: since the occupation of Denmark and Norway in April 1940, many Swedish ships had been unable to leave the Baltic Sea.

After long negotiations with the belligerents by both the ICRC and the Swedish government, it was agreed to form a neutral commission in Athens which would be responsible for the reception and distribution of food imported for the relief programme and supervise, in accordance with the pledges made to the Allies, the use to which local food production was put. This ‘Managing Commission for Greek Relief under the Auspices of the International Committee of the Red Cross’ (Commission de Gestion pour les Secours en Grèce sous les auspices du Comité international de la Croix-Rouge) was composed of eight members appointed by the Swedish Red Cross and seven from the ICRC; the Swedes appointed the chairman of the Commission, the ICRC its vice-chairman. The chairman had sole responsibility for all matters concerning the honouring of the guarantees given by the Swedish government to the blockading authorities; all other questions were to be settled by mutual agreement between the chairman and vice-chairman. The Managing Commission set up committees in the provincial capitals, towns and even in many villages to distribute the supplies. It could also rely on the help of Swedish Red Cross officials and ICRC delegates in the main cities.280

The results fully justified these complex arrangements. Swedish ships crossed the Atlantic 94 times between Canada (or Argentina) and Greece. From September 1942 to March 1944 they carried 17,000 tonnes of food each month; after further negotiations the shipments were increased to 29,000 tonnes a month from April to November 1944. By the time the operation was handed over to the Greek government in March 1945, the Managing Commission had received 610,000 tonnes of food in all from overseas, including 470,000 tonnes of wheat. Taking into account the relief supplies sent from Sweden and Turkey, those given by the Axis powers in
compensation and the relief provided by the Allies after liberation, the total amount of food and other relief distributed by the Managing Commission came to 712,000 tonnes. This was not merely a supplement, but the basic food supply for the cities, towns and villages, in other words for about half the population of Greece.281

Food consignments from abroad were financed mainly by the Canadian government, and later by the United States under the Lend-Lease Act. Other supplies were provided by the Red Cross Societies of Sweden and Switzerland, by the Turkish Red Crescent and by Greek associations abroad, in particular the Greek War Relief Association. The cost of chartering the Swedish ships was covered by the Greek government-in-exile in London.282

Most of the food was distributed through bakeries in the form of loaves or through groceries in weekly or monthly allocations. Additional rations for the most vulnerable groups were allocated through hospitals, maternity homes, nurseries, orphanages, school canteens and the kitchens of concentration camps and prisons. A milk feeding programme for babies and the sick was administered by the Swiss Red Cross delegation.283

As the chairman of the Managing Commission received his instructions directly from the Swedish government, the International Committee was worried that it might lose control of the relief operation, which it had itself initiated and for which it bore responsibility. Its misgivings were dispelled by the fact that ICRC/Swedish joint action made it possible to save the people of Greece from starvation. And although some friction did arise between the partners – inevitable in any joint operation – there were no fundamental disagreements. There is no doubt that the operation was carried out in accordance with Red Cross principles.284

The situation was no less critical in the countries of the Far East, particularly in China. There, however, the ICRC had no means of carrying out relief operations on any significant scale for the population suffering the effects of the war. Its delegates could do no more than provide limited assistance for prisoners of war and interned civilians.285

9. Conclusions

During the Second World War, ICRC operations expanded tremendously. They were marked by outstanding achievements, but also by bitter failures. From these numerous operations, carried out on various fronts and in situations that were constantly changing as the war took its course, three important points stand out with regard to the development of humanitarian law.

First of all, the sheer scale of the ICRC’s activities is striking. The figures speak for themselves. At 30 June 1947, the Central Agency’s card-
index contained almost 36 million cards; by that time, the Agency had received more than 59 million items of mail and had dispatched some 61 million. ICRC delegates had made 11,170 visits to prison camps. And despite the blockade and the disruption of transport, the ICRC had transported and distributed 470,000 tonnes of relief for prisoners of war and civilian internees, the equivalent of 90 million individual five-kilo parcels. In addition, the Joint Commission had handed out 165,000 tonnes of relief, while more than 750,000 tonnes of food and other supplies had been distributed in Greece.286

But the figures do not tell the whole story: just as important was the painstaking and systematic way the ICRC set about its work. The Central Agency, for instance, sought to obtain information on all prisoners of war and civilian internees, regardless of where they were held, while the ICRC did its utmost to ensure that its delegates made regular visits to all prisoners protected by the 1929 Convention. So while it is true that the action taken by the Committee was largely based on well-established operational procedures, the systematic nature of that action was new compared to its previous interventions and had major implications for the development of humanitarian law.

The second point is the global nature of the Committee’s activities. Faced with what became total war, the ICRC tried to find ways of protecting all victims, whatever their nationality and their status: wounded and sick members of the armed forces, prisoners of war, members of the resistance and partisans, civilian internees, concentration camp inmates, and the civilian population bearing the brunt of air raids and economic warfare. The fact that many of its approaches were rejected, that some governments obstinately refused to allow its delegates into their camps and prisons, does not detract from the efforts that were made. Never before had the ICRC undertaken so many operations covering such a wide variety of fields; never before had it sought to take such widespread action to counter the effects of a conflict which seemed to know no bounds.

Thirdly, there is no escaping the contrast between the ICRC’s successes in areas where its work was supported by humanitarian rules binding on the belligerents, and its inability to help when that support was lacking.

The situation of prisoners of war who were protected by the 1929 Convention and those captured on the Eastern Front or in the Pacific is a case in point: the first were able to maintain vital links with their families and their homeland; they benefited from the visits and the advocacy of representatives of the Protecting Powers and the ICRC; right up to the final weeks of the war, they continued to receive parcels from home; and despite the inevitable hardships and deprivations of imprisonment, their personal dignity and physical well-being was safeguarded. Those of the second category, on the other hand, were kept in total isolation, without protection against their captors and denied all material help; for many of them, captivity was simply an appalling humiliation followed by interminable agony.
The contrast is even more shocking when the fate of those civilian internees who were allowed to benefit by the provisions of the 1929 Convention on prisoners of war is compared with that of the deportees, hostages and concentration camp inmates who were helpless victims of degrading treatment, torture and arbitrary killing at the hands of their tormentors.

While the First World War had underscored the need to place prisoners of war under the protection of a detailed set of legal rules, together with supervision by neutral bodies – the Protecting Powers and the ICRC – to ensure compliance with its provisions, the war of 1939–45 showed just as starkly the need for similar protection to be extended to the civilian victims of conflict.

The measures proposed by the ICRC at the end of the war for the development of humanitarian law therefore included two vital objectives:

a) enlarging the scope of legal protection to cover all war victims;
b) incorporating in each new convention a mandatory form of supervision.

The war had given harsh and irrefutable proof of the need for such measures. The ICRC’s concern was consequently shared by meetings of experts and ultimately by delegates to the Diplomatic Conference convened to revise humanitarian law, at which the new Geneva Conventions of 12 August 1949 were adopted.

Notes


4 The Laws of Armed Conflicts, pp. 364–6.


6 See Chapter VI, Section 4, above, pp. 125–7.


8 For the ICRC’s work during the Spanish Civil War, see below, Chapter IX, Section 7, pp. 266–86.

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10 RICR, no. 249, September 1939, pp. 719–20; Durand, From Sarajevo to Hiroshima, p. 389.
12 Durand, From Sarajevo to Hiroshima, p. 397.
13 RICR, no. 249, September 1939, p. 741; Durand, From Sarajevo to Hiroshima, p. 400.
14 Letter from the ICRC to the governments of the belligerent states, 2 September 1939, RICR, no. 249, September 1939, pp. 741–6.
15 RICR, no. 249, September 1939, pp. 760–9.
16 360th Circular to Central Committees, 18 September 1939, RICR, no. 249, September 1939, pp. 753–8.
17 Ibid.
18 RICR, no. 249, September 1939, p. 755.
19 RICR, no. 250, October 1939, pp. 789–800.
21 Ibid., pp. 74–5.
22 Ibid., p. 72.
23 Ibid., pp. 82–3.
24 Ibid.
26 Ibid., p. 79.
27 Ibid., p. 72.
28 Ibid., p. 73.
31 Ibid., pp. 80–1.
32 Ibid., pp. 70–82.
33 Ibid., p. 84.
34 Ibid., pp. 69–70.
37 Ibid., p. 196.
39 Convention relative to the Treatment of Prisoners of War, 27 July 1929, Article 14, paragraph 4.
41 Ibid., p. 203.
42 Ibid., pp. 199–201.
43 Ibid., pp. 207–9.
44 Ibid., pp. 201–7 and 377–82.
48 See Chapter V, Section 3, above, pp. 84–90.
52 Ibid., pp. 49–50, 110–12 and 134–6. Thomas J. Watson, President of International Business Machines Corporation, donated the use of a number of the company’s machines in Europe to the ICRC for the entire war. These were mostly of three kinds: perforators, sorters and tabulators. By producing punched cards, according to a given code and using an electro-magnetic process invented by Herman Hollerith, the machines enabled numerical or alphabetical data to be sorted automatically, much faster and with less risk of error than by hand. These machines, the forerunners of modern computers, were used by a special service at the Agency – the Watson Section – which produced eight and a half million punched cards. Passing through the sorters almost 316 million times, the cards
enabled more than 66 million sorting operations to be carried out (ICRC Report, vol. II, pp. 108–14). Regimental enquiries were a tracing method involving the systematic questioning of every prisoner of war from the same military unit – regiment or warship – about the fate of their missing comrades (ibid., pp. 49–50).

54 RICR, no. 250, October 1939, pp. 790–3.
55 RICR, no. 252, December 1939, pp. 961–74.
57 Ibid., pp. 222 ff.
58 Ibid., pp. 242–3.
59 Ibid., p. 228.
61 Ibid., pp. 238–42.
64 Articles 4, 9–17, 23, 34, etc.
66 Ibid., p. 30.
67 Ibid., pp. 35–8.
68 Ibid., pp. 127–65. As the Committee could scarcely take on the responsibility of administering what amounted to a shipping company or shoulder the financial responsibilities involved, it created a ‘Foundation for the Organization of Red Cross Transports’, to be in charge of transportation of every kind in connection with the ICRC’s work. The members of the foundation were appointed by the ICRC, which supplied the initial capital of 10,000 Swiss francs. The foundation, entered in the Basel Commercial Register on 20 April 1942, bought three ships and chartered nine others. These vessels made 50 voyages, mainly between Europe and the USA, carrying more than 200,000 tonnes of relief (Report of the ‘Foundation for the Organization of Red Cross Transports’ on its Operations since Inception in April 1942 up to 31 December 1946, delivered to the International Committee of the Red Cross, ICRC, Geneva, April 1947).
70 Ibid., pp. 166–200.
71 Ibid., pp. 46–7 and 177–80.
72 Ibid., pp. 85–8.
76 Ibid., pp. 288–327.
77 RICR, no. 265, January 1941, p. 4.
80 Ibid., pp. 380–2.
83 Ibid., pp. 379–81.
84 Ibid., pp. 377–82.
85 Ibid., p. 395; Durand, From Sarajevo to Hiroshima, pp. 623–6. However, during the utter confusion immediately before and after the German capitulation, the ICRC’s truck convoys evacuated thousands of Allied prisoners of war and interned civilians, giving priority to the wounded and sick; after this chaotic period the Allied High Command took the matter in hand – ICRC Report, vol. III, pp. 190–5.
87 RICR, no. 356, August 1948, p. 536.
88 Memorandum on the present position of prisoners of war, 21 August 1945, ICRC Archives, file G. 85; RICR, no. 334, October 1946, pp. 840–2.
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90 Appeal of the International Committee of the Red Cross on behalf of prisoners of war, refugees and displaced persons, 31 December 1946, press release no. 333 b bis, ICRC Archives, file G 68/00; RICR, no. 337, January 1947, p. 86.


93 The Laws of Armed Conflicts, p. 339. The USSR was, however, party to the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, as well as to the Hague Convention IV of 1907 respecting the Laws and Customs of War on Land – see The Laws of Armed Conflicts, pp. 63 and 325.

94 Telegram no. 1039, ICRC Archives, file USSR Government (box 1084).

95 Letter from the USSR ambassador in Paris to the ICRC, 12 October 1939, ICRC Archives, file USSR Government (box 1084); Durand, From Sarajevo to Hiroshima, pp. 405–6.

96 Letter from the ICRC President to the People’s Commissar for Foreign Affairs, 26 October 1939, ICRC Archives, file USSR Government (box 1084); Durand, From Sarajevo to Hiroshima, p. 406.


99 Ibid., pp. 408–9.


107 Durand, From Sarajevo to Hiroshima, pp. 506–8.

108 Durand, From Sarajevo to Hiroshima, pp. 509–10. See also Junod’s account in Warrior Without Weapons, pp. 226–32.


110 ICRC Report, vol. I, pp. 421–7; vol. III, pp. 54–5. It was impossible to obtain sufficient food within the blockaded area of Europe.


114 Ibid., pp. 420–1.

115 Ibid.; Durand, From Sarajevo to Hiroshima, p. 510.


118 Ibid., p. 434.

119 Ibid., p. 435.

120 Durand, From Sarajevo to Hiroshima, pp. 517–18.


125 Youri Tepliakov, ‘Qui a trahi la Patrie?: La tragédie des prisonniers de guerre n’est pas terminée’, Nouvelles de Moscow, Moscow, 13 May 1990.


128 The Laws of Armed Conflicts, p. 365. On 6 August 1940 the ICRC contacted the Japanese government, urging it to ratify the Prisoners-of-War Convention – Note from the ICRC President to the Japanese Minister of Foreign Affairs, 6 August 1940, ICRC Archives, file Japanese Government (box 1062).

129 In October 1944, there were 6400 Japanese prisoners of war in Allied hands, while Japan held an estimated 103,000 Allied prisoners of war – ICRC Report, vol. I, p. 439.


135 Ibid., pp. 444–5.


137 Ibid., p. 449.


140 Durand, From Sarajevo to Hiroshima, pp. 529–31.


142 Ibid., pp. 461–3.


144 The main interventions are summarized in ICRC Report, vol. I, pp. 519–35.


147 A summary of the ICRC’s efforts to help victims of the Nazi concentration camps is included in the following section.


150 Ibid., pp. 539–43.

151 Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, signed at St Petersburg, 29 November/11 December 1868, Handbook of the International Red Cross, pp. 296–7; The Laws of Armed Conflicts, pp. 101–3.


154 Handbook of the International Red Cross, p. 308; The Laws of Armed Conflicts, p. 89.

155 From the legal viewpoint, the Jewish victims of Nazi persecution belonged to various categories:

- citizens of the Third Reich;
- citizens of the ‘Protectorate of Bohemia-Moravia’;
- citizens of Germany’s allies or satellites (Italy, Hungary, Romania, Bulgaria, Croatia, Slovakia);
citizens of the occupied countries (Poland, Denmark, Norway, the Netherlands, Belgium, Luxemburg, France, Yugoslavia, Albania, Greece, occupied areas of the USSR);
• refugees and stateless persons.

Under international law, a distinction in terms of legal status should have been made between these various categories according to their respective nationality. Consequently, whereas international law at that time did not protect the citizens of a state from their own government, nationals of the occupied territories should at least have enjoyed the minimal protection offered by customary law and by Articles 42 to 56 of the Hague Regulations.

In practice, however, this distinction was largely ignored. All Jewish victims of Nazism were subjected to the same policies of persecution and extermination. Only in a few cases did the criteria of nationality prevail over that of race: Jewish nationals of English-speaking countries and of some Latin American countries – which were themselves holding German prisoners of war or interned civilians and had the benefit of a Protecting Power – and to some extent Jewish citizens of neutral states (which the Nazis tried not to antagonize) were spared persecution, although they did not escape harassment.

157 See Chapter VI, Section 4, above, pp. 125–7.
158 Hague Convention IV of 18 October 1907 had laid down general principles rather than rules that were directly applicable; it did not provide for any supervision; and the provisions covering occupied territories had been violated to such an extent during the First World War, without incurring any punishment, that their effectiveness was doubtful.
159 Letter from the ICRC to the governments of the countries at war, 2 September 1939, RICR, no. 249, September 1939, pp. 741–6, in particular pp. 745–6.
160 Note verbale from the Reich Minister of Foreign Affairs to the ICRC, 28 September 1939, ICRC Archives, file G.85; Documents relating to the work of the International Committee of the Red Cross for the benefit of civilian detainees in German Concentration Camps between 1939 and 1945, ICRC, Geneva, 1975 (hereinafter Documents …), p. 28.
161 ICRC memorandum on the possibility of reaching agreements destined to improve the condition of war victims during the present hostilities, 21 October 1939, RICR, no. 254, February 1940, pp. 140–8, notably pp. 140–2; Documents …, pp. 29–30. The term ‘civilian internees’ was used to denote enemy aliens who were in the territory of a belligerent state at the outbreak of hostilities and who were interned solely because of their nationality.
162 Documents …, pp. 30–3.
163 Ibid., pp. 34–5.
164 Note from the ICRC on the application of the Convention of 27 July 1929 relative to the treatment of prisoners of war to civilians of enemy nationality, 7 December 1939, RICR, no. 254, February 1940, pp. 148–51.
165 Thanks to the negotiations conducted by the ICRC, about 160,000 civilian internees benefited throughout the war from the guarantees laid down by the Geneva Convention. An account of the Committee’s work on their behalf is given in ICRC Report, vol. I, pp. 573–607. It should be noted that in the Far East, ICRC delegates met far fewer difficulties in their work for civilian internees than in their efforts on behalf of prisoners of war: enemy civilians were not considered by the Japanese to have lost face by being interned, and the Tokyo government was far from unconcerned about the fate of Japanese nationals living in enemy territory when Pearl Harbour was attacked – the argument of reciprocity could therefore be usefully invoked; ICRC Report, vol. I, pp. 437 ff.
166 Durand, From Sarajevo to Hiroshima, pp. 553–4; Jean-Claude Favez, in co-operation with Geneviève Billeret, Une mission impossible?: Le CICR, les déportations et les camps de concentration nazis, Éditions Payot, Lausanne, 1988, pp. 73–4.
167 Durand, From Sarajevo to Hiroshima, p. 555.
168 Documents …, pp. 36–7; Durand, From Sarajevo to Hiroshima, pp. 555–7 and 560.
169 Note from Roger Gallopin to the ICRC delegation in Berlin, 16 April 1942, ICRC Archives, file G.3/26e; Favez, Une Mission impossible?, p. 233.
170 Letter from Professor Burckhardt to the Acting President of the German Red Cross, Dr Grawitz, 1 June 1942, ICRC Archives, file G.44/13, box 746, sub-file ‘Holländais’; Documents …, pp. 37–9.
171 Letter from Dr Grawitz to Professor Burckhardt, 7 July 1944, ICRC Archives, file G.44/13,
The German Red Cross from 1938 to the spring of 1945, was also the head of the SS Medical Service. He was one of the people in charge of pseudo-medical experiments on the inmates of concentration camps. He committed suicide in April 1945 and was briefly succeeded as head of the German Red Cross by his deputy, Dr Karl Gebhardt, surgeon-general of the SS, who was hanged at Nuremberg for his part in the experiments. The extent to which the German Red Cross was contaminated by the most criminal elements of the Nazi hierarchy is all too clear. In its relations with the Reich government, the ICRC was thus deprived of the vital support which might have been given by a National Society worthy of the name.

172 Durand, *From Sarajevo to Hiroshima*, p. 557.
173 Note from the German Red Cross to the ICRC, 29 April 1942, ICRC Archives, file G.59; Favez, *Une Mission impossible?*, p. 128; *Documents ...*, p. 37.
174 Note from the German Red Cross to the ICRC, 20 August 1942, ICRC Archives, file G.59; Favez, *Une Mission impossible?*, p. 129; *Documents ...*, p. 40.
179 An account of the work of the ICRC from November 1944 to May 1945 to help the Jews of Slovakia is given in Georges Dunand’s *Ne perdez pas leur trace!*, Éditions de la Baconnière, Neuchâtel, 1950; Favez, *Une Mission impossible?*, pp. 268–80.
182 In this context, there is a striking disparity between the numbers of migrants envisaged under the various plans (270 children from the Balkans, 4500 children accompanied by 500 adults for Palestine, 4000 people for Sweden, 1600 for Switzerland, and so on) and the total number of Jews desperate to leave Nazi-dominated Europe to save their lives.
183 Letter from the President of the ICRC to Regent Horthy, 5 July 1944, ICRC Archives, file G.59/4; *Documents ...*, pp. 52–3.
184 Reply from Regent Horthy to the ICRC President, 12 August 1944, ICRC Archives, file G.59/4; *Documents ...*, p. 53.
185 Note of 13 June 1944 (no. 8663) from the US Legation in Berne to the Swiss Foreign Ministry’s Foreign Interests Division (FID), passed on by the Swiss Legation in Budapest to the Hungarian government on 27 June; telegram of 30 June 1944 from the Swiss Legation in Budapest to the Foreign Ministry in Berne; note of 2 August 1944 by the FID (no. 37950) + attachments; note of 2 August 1944 (no. 8967) from the US Legation in Berne to the FID, Federal Archives, Berne, file E 2001 (D) 11/9 (copies of these documents were kindly made available on 28 August 1989 by Mr Oscar Gauye, Director of the Swiss Federal Archives, whose help I acknowledge with gratitude); *Foreign Relations of the United States: Diplomatic Papers*, 1944, vol. I, *General*, United States Government Printing Office, Washington, 1966, pp. 1088–9 and 1230–1; Randolph L. Braham, *The Politics of Genocide: The Holocaust in Hungary*, Columbia University Press, New York, 1981, vol. II, pp. 752–4; Braham notes that the American warning was reinforced by ‘an unusually heavy air raid on Budapest on July 2’ (pp. 754 and 1213).
186 Note by Carl Burckhardt on his meeting with Mr Imre de Tahy, *chargé d’affaires* at the Hungarian Embassy in Berne, 18 July 1944, ICRC Archives, file G.59/2/65; press release no. 226 of 18 July 1944, *RICR*, no. 307, July 1944, p. 578. The Budapest government’s decision to suspend deportations on 7 July is documented in the Hungarian State Archives; this was the same day that the ICRC handed a note with a request to that effect to the Hungarian Embassy in Berne. Given the time it took for messages to be passed on, the Hungarian decision could not have been a response to the ICRC’s request, whatever the Committee might have thought at the time. Quite clearly, the decisive factor was the American warning, which reflected the change in the strategic situation and the serious defeats suffered by Germany and her allies in June 1944. For further details, see the
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188 Letter from Mgr Tiso to the ICRC President, 10 January 1945, ICRC Archives, file G.59/4; Favez, Une Mission impossible?, pp. 278–9.

189 See the account by André Lambert, ICRC delegate in Greece from 1943 to 1949, J'ai épousé une Grecque, unpublished manuscript, pp. 19–25.


191 Ibid., p. 335.


193 Ibid., p. 38.


196 The work of the delegates in Croatia, Slovakia, Romania, Bulgaria and Italy is covered in Favez, Une Mission impossible?, pp. 259–314; Slovakia is also dealt with in the account by Georges Dunant, Ne perdez pas leur trace!, Éditions de la Baconnière, Neuchâtel, 1950.


199 Durand, From Sarajevo to Hiroshima, pp. 577–8; Favez, Une Mission impossible?, pp. 124–6.

200 For example, the Dutch hostages at Buchenwald were returned to the Netherlands in December 1941 and interned at s’Hertogenbosch, where ICRC delegates were able to visit them.

201 Confidential letter from Frédéric Barbey to the Berlin delegation, 30 March 1942, ICRC Archives, file G.59/2/51; letter from Roger Gallopin to the Berlin delegation, 16 April 1942, ICRC Archives, file G.3/26e; Favez, Une Mission impossible?, p. 233.

202 Note from Dr Marti to the ICRC, 20 May 1942, ICRC Archives, file G.3/26e; Favez, Une Mission impossible?, p. 233. Dr Sethe, deputy head of the Foreign Ministry’s Legal Section, was the ICRC’s principal contact at the Wilhelmstrasse.


204 Note from the German Red Cross to the ICRC, 20 August 1941, ICRC Archives, file G.17/All; Favez, Une Mission impossible?, p. 123.

205 Notes from the German Red Cross to the ICRC, 29 April and 20 August 1942, ICRC Archives, file G.59/8; Favez, Une Mission impossible?, pp. 128–9.

206 ICRC Archives, file G.59/8, box 883.

207 ‘Are all the Jews definitely being moved from enemy-occupied countries to Poland?’, letter from the British Red Cross to the ICRC, 7 August 1942, ICRC Archives, file G.59/8, box 883.

208 Note from the ICRC to its delegation in Berlin + attachment, 24 September 1942, ICRC Archives, file G.59/8; Documents …, pp. 41–3; Favez, Une Mission impossible?, pp. 134–8.


210 Decree of 7 December 1941, Nuremberg Documents, vol. I, p. 90; Note from the Oberkommando der Wehrmacht (OKW) to the German delegation to the Armistice Commission, 25 June 1943, document produced at Nuremberg (RF-326). The December 1941 decree is given in Durand, From Sarajevo to Hiroshima, pp. 579–81; the 25 June 1943 Note is given in Favez, Une Mission impossible?, p. 237.
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212 Ibid., p. 46; Favez, Une Mission impossible?, pp. 141–4.
213 Favez, Une Mission impossible?, p. 169.
214 ‘Service des colis aux camps de concentration (CCC) du Comité international de la Croix-Rouge’, RICR, no. 320, August 1945, pp. 601–15; Durand, From Sarajevo to Hiroshima, p. 588.
215 Documents..., pp. 18–19.
218 RICR, no. 320, August 1945, pp. 605–6.
219 In fact, from September 1939 to March 1945, the ICRC’s delegates made only two visits to Nazi concentration camps:

- On 14 August 1940, Dr Descoeudres and Dr Marti were allowed into Buchenwald camp, in Germany, to meet the Dutch hostages there; they also had the opportunity of visiting part of the camp, although they were not permitted to speak freely with the detainees; their report highlighted the contrast between the camp installations – up-to-date and spotlessly clean – and the apathy of the inmates, a mute testimony to the harshness of their treatment.
- On 23 June 1944 Dr Rossel visited the ghetto city of Theresienstadt, in the German protectorate of Bohemia-Moravia, but was not allowed to speak freely with the internees, nor to go inside the citadel (the Kleine Festung) which adjoined the ghetto and which had been converted into a concentration camp.

For the other concentration camps, the delegates had to make do with interviews with the camp commandants or their deputies; while they were sometimes permitted inside the administration buildings (Kommandantur) to ask about the numbers and nationalities of the detainees or the arrival of relief supplies, etc., they were never able to speak to the inmates or inspect the premises used by them.

As far as is known, the August 1940 visit to Buchenwald did not give rise to any adverse comment. But Dr Rossel’s visit to Theresienstadt was criticized in many respects. Theresienstadt was in fact a kind of ‘model camp’ which the SS had set up for propaganda purposes. Conditions there were far from good, but they bore no resemblance to those of other concentration camps, not to mention the death camps. In the weeks preceding Rossel’s visit the ghetto had been carefully refurbished and flower beds planted. Everything was done to give the impression that the Jews there spent happy and peaceful days under the benevolent gaze of their German protectors, and this was certainly the image it projected, not so much in Dr Rossel’s report following the visit, but in the photos and water colour sketches which accompanied it. After the war, the ICRC was accused of playing into the hands of the Nazi propagandists.

It is hard to judge how far Dr Rossel was taken in by the deception; his report relates what he saw and heard, with personal comments reduced to a minimum. Unable to speak privately with the inmates, he could have no idea of the conditions inside the Kleine Festung, nor any way of knowing that thousands of detainees had been deported to Auschwitz. Besides, the leader of the Jewish community himself, Dr Eppstein, had informed him that Theresienstadt was the final destination for its inmates (an Endlager), and not a transit camp.

But in fact the ICRC was not fooled. The difference between the number of inmates present at the time of the visit and the figures which the ICRC had received from other sources made it clear that thousands of inmates had meanwhile been deported. In the absence of private conversations with the inmates, no reliable conclusions could be drawn during the visit about conditions in Theresienstadt, and even less about those in other concentration camps whose doors remained closed to the ICRC. It therefore refused to pass on Dr Rossel’s report, either to the German authorities – who would have used it for propaganda purposes – or to the Allies, as this one-off visit gave no reliable indication of the situation of the Jews in German-controlled territories. There is consequently no justification for accusing the ICRC of complicity with the Nazis.
Finally, in support of the decision to make the visit, it must be borne in mind that Jewish organizations and the families of internees were pressing the ICRC for information about the identity of the inmates at Theresienstadt and the conditions there. Furthermore, there was a great risk that by refusing to visit the only camp to which the Nazis had authorized access, the ICRC would have ruled out virtually any hope it might have had of obtaining access to others.

220 Note from the ICRC to the German Minister for Foreign Affairs, 2 October 1944, ICRC Archives, files G.6 and G.44/13; Documents ..., pp. 57–9; Favez, Une Mission impossible?, pp. 340–1.

221 Letter from the ICRC President to the German Minister for Foreign Affairs, 2 October 1944, ICRC Archives, files G.6 and G.44/13; Documents ..., p. 57; Favez, Une Mission impossible?, p. 340.

222 Memorandum concerning the steps taken by the ICRC on behalf of alien political detainees, sent to the Consuls of the United Kingdom and the United States of America in Geneva, 16 October 1944, reproduced in Documents ..., pp. 59–60.

223 Letter from the ICRC President to the Reich Foreign Minister, 9 December 1944, ICRC Archives, file G.85; Documents ..., pp. 63–4.

224 Note from the German Consulate in Geneva to the ICRC, 1 February 1945, ICRC Archives, file G.44/13; Documents ..., pp. 66–7.

225 Letter from the ICRC President to the German Consulate in Geneva + attachment, 15 February 1945, ICRC Archives, file G.44/13; Documents ..., pp. 67–9.

226 Durand, From Sarajevo to Hiroshima, p. 592.


228 Documents ..., p. 70; Durand, From Sarajevo to Hiroshima, pp. 595–7.

229 Documents ..., pp. 70–2.


231 Documents ..., pp. 87–92; Favez, Une Mission impossible?, p. 356.

232 Durand, From Sarajevo to Hiroshima, p. 598. In the days following the liberation of the camps by Allied forces, the ICRC’s convoys repatriated 5200 survivors of Mauthausen, Dachau and Theresienstadt, bringing the total of those repatriated by the ICRC to 10,750 (ibid., p. 607).


234 Documents ..., pp. 112–14; Durand, From Sarajevo to Hiroshima, p. 604; Favez, Une Mission impossible?, pp. 363–4.


236 The situation was further complicated by the fact that some of the victims of Nazi persecution were German, while others were nationals of the Third Reich’s allies or satellites (Hungary, Slovakia, Croatia, etc.); these countries had agreed to allow their citizens to be deported to Germany. International law in force at the time offered no basis for intervening to protect people from their own government. The Germans lost no opportunity of putting forward this argument in order to obstruct the ICRC’s efforts.

237 Friedländer, L’antisémitisme nazi, pp. 177–81.


239 Favez, Une Mission impossible?, pp. 86 and 393, note 35. Contrary to what has often been said and written, the ICRC did not refuse to share its information with the Allied governments, as is shown by the memorandum of 9 November 1942 from Paul C. Squire, United States Consul in Geneva, to the State Department, quoted by Walter Laqueur, The Terrible Secret: An Investigation into the Suppression of Information about Hitler’s ‘Final Solution’, Weidenfeld and Nicolson, London, 1980, pp. 63–4; Favez, Une Mission impossible?, pp. 98–9.

240 Documents ..., p. 4.


Memorandum du Comité international de la Croix-Rouge sur la possibilité d’accords destinés à apporter pendant les présentes hostilités certaines améliorations au sort des victimes de la guerre et à faciliter le fonctionnement des Services de santé des armées, 21 octobre 1939’, RICR, no. 254, February 1940, pp. 140–8.


Resolution XXIV, Seventeenth International Conference of the Red Cross, Stockholm, August 1948, Report, Swedish Red Cross, Stockholm, 1948, pp. 78 and 94.


Ibid., p. 365.


Ibid., pp. 120–4 and 144–88.

Ibid., pp. 77–80.

Ibid., pp. 27–38.

Ibid., pp. 97–107.

Ibid., pp. 128–39.

Ibid., pp. 287–432.
The ICRC and the Protection of War Victims

286 The tremendous increase in activities is shown by a comparison with the figures for 1914–20: during that time the International Prisoners-of-War Agency drew up eight million cards, delegates made 534 visits to prison camps, and by 11 November 1918, the ICRC had forwarded and distributed 1.8 million individual relief parcels, as well as 1813 wagon-loads of collective relief.

References

CHAPTER IX

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND INTERNAL CONFLICTS (1863–1945)

Le respect dû aux malades et aux blessés ne dérive pas de la Convention de Genève, mais de leur seule qualité de malades et de blessés ...

‘La Convention de Genève et l’insurrection brésilienne’, Bulletin international, no. 98, April 1894, p. 79.

1. Introduction

The law of war was born of armed conflict between sovereign powers with equal rights. This law long existed as a set of customary rules which kings observed with regard to their peers, but which did not apply to relations between sovereigns and subjects who rebelled against them. Similarly, the first codified rules governing the conduct of hostilities – the Paris Declaration of 1856, the Geneva Convention of 1864, the St Petersburg Declaration of 1868 and the Hague Conventions of 1899 and 1907 – were binding only on the contracting parties – namely, the states.

The law of war, in other words all the customary and treaty rules governing the conduct of hostilities, was consequently not applicable to internal conflicts. In such situations only national legislation could be taken into account. The sovereign was free to use all the force of criminal law against rebellious subjects; insurgents were usually regarded as outlaws and treated as such. In practice this led to extremely severe repressive measures and an escalation of violence.

The application of certain rules of the law of war could not be considered a legal obligation but simply as an act of clemency or humanity intended to reduce, as far as circumstances allowed, the horrors that civil war inevitably entailed.

When the usual means of repression and sanctions under criminal law failed to quell a rebellion, the government concerned might claim for itself and grant its opponents the status of belligerent. The recognition of belligerency could be either explicit, in the form of a declaration of war, or implicit, as in the imposition of a naval blockade or similar action. Whatever form it took, its effect was to make relations between the two sides subject to
most of the laws and customs of warfare, and in particular to all humanitarian rules. Such a status gave the insurgent party a limited legal personality, restricted to the application of *jus in bello* and valid only for the duration of the conflict in question. However, for a government locked in the grip of a civil war, this was a discretionary power. Whether or not it was exercised depended on the balance of power between the government and the rebels.\(^2\)

If a state of belligerency was recognized by the government of a state not involved in the civil war, this recognition brought the law of neutrality into effect in the relations between that state and the two parties to the conflict.\(^3\) These rules are still valid, even though belligerent status has not been recognized in recent conflicts.

It can therefore be seen that the general terms ‘civil war’ and ‘internal conflict’ cover situations that might differ substantially both in fact and in law: in *fact*, according to how well the insurgents are organized and the degree of control they exercise over a greater or lesser area of the national territory; and in *law*, according to whether or not there has been a recognition of belligerency by the national government or by foreign powers.

Nonetheless, the distinction between international conflicts waged between two states or alliances of states, and internal conflicts taking place on the territory of one state, has always been upheld in both theory and practice. Similarly, it has always been accepted that the laws and customs of war were not directly applicable to internal conflicts, and that when they became so, they could not be applied as a whole.

The existence of a specific legal regime is the reason why the problems relating to the intervention of the Red Cross in internal conflicts or the discussions to which these questions have given rise at International Red Cross Conferences have not yet been considered in this book.\(^4\) This is a dual omission which the present chapter will seek to rectify.

Although such an approach is a departure from the chronological order of the book, it should thus be possible to examine, in the space of one chapter, the legal and historical aspects of the ICRC’s intervention in internal conflicts up to the end of the Second World War.

### 2. Early interventions by the Red Cross in internal conflicts (1863–1912)\(^5\)

The uncertainty as to the legal rules applicable to internal conflicts left the Red Cross in a dilemma.

The organization had, after all, been created to assist wounded soldiers in wars *between* nations. Intervention by the relief societies in the event of civil
war was never envisaged by the founding Conference in October 1863. Furthermore, Red Cross Societies were formed as auxiliaries to the armed forces’ medical services, and as such it was difficult to imagine them being able to act independently and impartially during a civil war. The Geneva Convention itself, which was the cornerstone of the whole new institution, was applicable only in wars between its signatories. There were indeed serious obstacles to any Red Cross intervention in internal conflicts.

But beyond such legal considerations, it seemed utterly unacceptable to abandon the wounded when the Red Cross had been created precisely to help them. Theoretically, at least, the movement was left in stalemate.

The question was of most immediate concern to National Societies in countries engaged in internal conflicts. But in fact, these Societies had found practical ways of taking action long before the theoretical problems of Red Cross intervention in civil wars had been seriously discussed.

During the Paris Commune, in 1871, the French Society for the Relief of Wounded Soldiers sought to continue the work it had carried out during the Franco-Prussian War; throughout the internal conflict it provided assistance alongside the medical service of the regular army, while in Paris itself the field hospitals set up during the siege of the capital never faltered, despite the fact that the revolutionary government had ordered the Society’s property to be confiscated. These units cared for the wounded of both sides.7

In Spain, during the Third Carlist War (1872–6), the Spanish National Society’s neutrality was generally recognized and respected, enabling it for some time to step in on both sides. But as the conflict wore on the Carlists established their own relief society (‘La Caridad’) to work in areas they controlled, while the official Society continued to work with the regular army’s medical teams. From then on, both societies operated a liaison office in Paris.8

These early examples created a precedent. On many occasions since then, the respective National Societies have intervened to alleviate distress when their own countries were engaged in civil war, either by merely acting as an auxiliary to the medical services of the regular forces or by trying to assist on both sides.

The problems became more complex when a Society from another country wanted to provide assistance to the victims of a civil war.

Such was the case during the Transvaal rebellion of 1881. From the outset the Netherlands Red Cross wanted to help the Afrikaaners, with whom the Dutch people felt a strong affinity. But while public opinion and some local branches of the Society called for the immediate dispatch of relief, the Society’s Central Committee felt that it could not act without the consent of the British government, which then ruled Transvaal and the Orange Free state. However, London shortly afterwards acknowledged the Boers’ rights as belligerents and let it be known that it would not oppose assistance to either side. The Dutch Society thereafter felt that it could act under the same conditions as if the conflict were taking place between two countries.9
A different situation arose in Cuba, where Spanish rule was being worn down by frequent uprisings. The 1895 rebellion led to a vicious civil war; under the pretext of protecting the civilian population from rebels, the authorities gathered villagers in concentration camps where they were decimated by famine and disease. Despite the fierce fighting, neither Spain nor other governments recognized the rebels as belligerents. In 1897 the American Red Cross decided to send a relief mission to the island, to which Spain agreed: under the energetic leadership of Clara Barton a major food and medical aid operation was mounted early in 1898 for the so-called concentrados, but when relations between Spain and the United states were broken off a few months later the American Red Cross delegation had to leave.10

This mission was an important precedent. As the International Committee pointed out, it was the first time that a National Society from outside a country engaged in civil war had obtained permission to work at the scene of a rebellion.11

The American Red Cross sent similar missions during uprisings in Nicaragua (1909), Honduras (1911) and China (1912).12

The International Committee viewed the whole question of Red Cross intervention in internal conflicts with great reserve. Its position was, however, somewhat ambivalent.

On the one hand, the Committee believed that the Geneva Convention embodied fundamental humanitarian principles which were applicable in all circumstances. Even if the Convention itself applied only between the contracting parties, it nevertheless met certain humanitarian demands which could not be ignored in the event of internal conflicts; the requisite respect to be shown for the wounded did not stem from the Convention, but from the fact that, as wounded human beings, they were entitled to it. The Committee therefore insisted that the Red Cross had the right to assist the wounded during internal conflicts in the same way as in wars between states; it went so far as to say that National Societies had a duty to help the victims of civil wars and rebellions.13

On the other hand the ICRC felt that civil war was essentially an internal affair, which concerned above all the National Society of the country in question. Sister Societies could offer their help to the Society of that country but not to the parties to the conflict.14 The Committee itself, as co-ordinator of Red Cross work at international level, should not get involved: it could offer its services only in exceptional cases, and then only if both sides agreed to ask for its help.15

In fact, while the Committee always carefully monitored the situation of victims of internal conflicts, there are only two known cases where its concern went beyond a declaration of the humanitarian principles to be applied and resulted in action, limited though it might have been.

During the Third Carlist War of 1872 to 1876, the ICRC sent a circular to the Central Committees asking them to support the relief societies on both
sides in their work to assist the wounded. However, before doing so it waited until the two Societies in question had opened their liaison office in Paris which undertook to divide the donations equally. This prevented the impartiality of the International Committee, and of the Red Cross as a whole, from being called into question.16

From the start of the Macedonian uprising against the Ottoman Empire (1903–4), the ICRC publicized the plight of the victims of the insurrection and of the repression that followed in the Bulletin international; but it likewise did not appeal to National Societies for help until it was requested to do so by the Bulgarian Red Cross.17

These two examples, together with the absence of any action taken by the Committee in the many other internal conflicts which marked the close of the nineteenth century, show the narrow limits which the ICRC felt it had to respect when dealing with internal conflicts and the precautions it considered necessary to ensure that any action it took was not seen either as unacceptable interference in the internal affairs of a country or a National Society, or as bias towards one side or the other.

Clearly, the question of Red Cross intervention in internal conflicts concerned the movement as a whole; the correct place to discuss it was the International Conference.18 But it was not until the Ninth International Conference, held in Washington in 1912, that it was finally addressed by the movement.19 This delay is a clear indication of the difficulties inherent in the question of Red Cross assistance to the victims of civil war, as well as the reticence of the Red Cross over discussing what action it might take.

3. The Ninth International Conference of the Red Cross (Washington, 1912)20

The credit for having initiated the first international discussion about the intervention of the Red Cross in situations of internal conflict falls to the American Red Cross, which submitted a report to the Ninth International Conference, held in Washington in 1912, on the role the Red Cross could play during civil wars or uprisings.21

The report, presented on behalf of the Society by Joshua Clark, Solicitor for the Department of state, began by stressing the need for all wounded or sick combatants, as well as all non-combatant victims of internal strife, to be given the assistance they required. It then set out to define the conditions under which the National Society of a foreign country might offer its services to both parties to help the victims of the unrest, even without a formal recognition of belligerency, since it was already accepted practice that once the government in power had claimed belligerent status for itself or granted such status to the opposition, National Societies of countries could offer assistance just as they did in international conflicts. Finally, the report outlined a draft convention designed to guarantee the impartiality of the Red Cross and
specify the rights and obligations of a National Society which offered help, as well as those of the Societies on each side of the conflict.22 

The report made no reference to any possible role for the ICRC. This is hardly surprising, since the document was essentially a summary of the experience acquired by the American Red Cross in sending relief missions to the Caribbean and China. Moreover, the ICRC at the time did not feel it was in a position to offer its services in internal conflicts.

The American Red Cross report was remarkable in that it managed to reconcile the interests of the victims, Red Cross freedom of action and the rights of the parties to the conflict. The sovereignty of the government in power was amply protected – under point 3 of the draft convention, a foreign relief society would not have been allowed to carry out an assistance operation on the rebel side if the government objected.23 The draft also stressed that offers of help from National Societies of other countries were intended as purely philanthropic, and could not be interpreted as a form of recognition of belligerent status, or even as a first step in that direction.24

For all that, the draft caused an uproar among the representatives of certain European governments; among them, General Yermolov expressed the opposition of the Russian imperial government with an eloquence that would have been admirable if put to better use:

As the delegate of the Imperial Government, I consider and declare that the Imperial Government would under no circumstances, and in no form whatever, become a party to, or even discuss, any agreement or recommendation on this subject; I consider that, in view of its politically serious nature, this subject should not even be a matter for discussion at a conference devoted exclusively to humanitarian and peaceful affairs. I further consider that Red Cross Societies have no duty whatsoever towards bands of insurgents or revolutionaries who cannot be considered by the laws of my country as anything other than criminals .... Any offer of services from Red Cross Societies, whether direct or indirect, to insurgents or revolutionaries could be seen only as a breach of friendly relations, indeed as an unfriendly act likely to encourage and foment sedition and rebellion ...25

Nonetheless, the question was discussed by a special commission and then in plenary session; but in order to avoid a vote which would have caused a split in the Red Cross ranks without doing anything to promote concrete action, the Conference decided it would take note of the document as submitted, without stating any opinion.26 Some delegates expressed the hope that the question could be taken up at a later Conference.27

The Conference chairman, Gustave Ador, ended the debate by stressing that the question remained open:

This question will remain on the agenda for all Red Cross Societies, which will consider it in the light of the circumstances of their own countries ... It also remains on the agenda of all Governments and ... it is very possible that in a few years' time the question will have greatly progressed, so that the solution which eludes us today may then be found.28
In fact, what most National Societies lacked was firsthand experience of a relief operation for victims of internal conflicts. In these discussions the Red Cross, which never hesitated to take action when in the actual presence of suffering, appeared reluctant to adopt a policy for a field of activity of which it had no practical experience.

More than time, it needed a precedent. This was soon to be provided by the Russian Civil War.

4. The Russian Civil War (1917–21)

Russia was the only major European power to have maintained an absolute monarchy right up to the start of the twentieth century. But its basis had been eroded by economic and social changes; the defeat in Manchuria and the rebellion of 1905 had exposed the regime’s failings. However, the government’s response to calls for reform was to clamp down more firmly than ever.

It was this empire, undermined by nationalist demands and social tension, which had to face the gruelling challenges of the First World War. The early defeats at Tannenberg and the Masurian Lakes along with efforts to reverse the military situation were to impose enormous sacrifices on the Russian people, sacrifices which were all the more painful since the nation was divided in its support for the war. As the ultimate source of authority, the Tsar was blamed for his government’s incompetence, the economic crisis and the disasters on the battlefield. In March 1917 violent riots over food shortages broke out in Petrograd (St Petersburg), with troops joining the mob; during the night of 15–16 March, Nicholas II abdicated.

A Provisional Government, led first by Prince Lvov and then by a lawyer, Kerensky, strove to reorganize the country and stage a military recovery, but to no avail. The old order was collapsing under the revolutionary onslaught unleashed by the downfall of the Romanovs.

From Switzerland, where he lived in exile, Lenin fanned the flames of revolution. Immediately after the Tsar’s abdication Lenin returned to Petrograd and took control of the Bolsheviks. A rival power, the Soviets of workers and soldiers, emerged to challenge the authority of the Provisional Government. In October 1917, the Petrograd Soviet ordered an armed insurrection which overthrew the government on 7 November (25 October in the Russian calendar).

The new authorities acted swiftly: agrarian reform (9 November) was followed by workers’ control of the factories (14 November), the nationalities decree (15 November), and so on. Though these measures had, for the time being, little more than a theoretical impact, they were evidence of the profound changes that had occurred. It was not merely a transfer of power – it was a complete economic and social upheaval.

But the most urgent priority was peace. The army, wracked by doubt, indiscipline and desertions, was on the verge of disintegrating. The publication
of the peace decree, on 9 November, made clear the Soviet authorities' intention to secure peace without annexations or indemnities; it confirmed their wish to withdraw from the conflict as soon as possible, a move that presaged the end of the Entente with Britain and France. On 26 November the government called for an armistice, which was agreed on 15 December 1917. For a while the negotiations with Germany made no progress, and fighting broke out again on 18 February; but peace was at last concluded at Brest-Litovsk on 3 March 1918.

Meanwhile, the whole edifice of the old imperial state was falling apart. Secessionist movements sprang up in Finland, the Baltic states, Poland, Ukraine, Georgia, Armenia and elsewhere, while at the same time counter-revolutionary forces were gathering strength. The new Soviet authorities were soon faced with armed resistance around the periphery of the former empire: civil war was superseding the 'imperialist war'.

It was thought that the end of hostilities in Europe might determine the outcome of the Civil War. After their victory over the Central Powers, several Allied leaders gave serious thought to crushing the Russian Revolution and thereby nipping the threat of contagion throughout Europe in the bud. Britain and France landed troops in northern Russia and the Ukraine, while the Japanese occupied Vladivostok and part of Siberia. The Soviets were then assailed from all sides: by the troops of General Yudenich in the north, Generals Denikin and Wrangel in the south, Petlyura in the Ukraine, and Admiral Kolchak and the Czechoslovak Legion in the Urals.

But the Western Powers were unable to sustain a costly and prolonged war, and pulled out their forces after a few months, having achieved nothing. Deprived of this support, and incapable either of co-ordinating their operations or of winning popular support, the White armies were defeated one by one. Resistance collapsed in southern Russia in November 1920 and in Siberia the following year.

The end of the fighting did not mean, however, the end of the suffering. A terrible famine swept through the country, already ravaged by seven years of international and civil war, while refugees flooded into eastern Europe, Turkey, Persia and China.

The Civil War took place in a country the size of a continent and gave rise to an upsurge of violence which can be explained only by intense class hatred which had festered for generations. It posed new problems for the International Committee, problems for which it was ill-equipped to find solutions: at the legal level, the Washington Conference had refused to sanction Red Cross intervention in internal conflicts, while at the practical level the Committee had no resources of its own and could only channel relief supplies provided by others at their own discretion.

However, the Committee could hardly shut its eyes to a conflict which was creating innumerable victims – and which had to be seen as a by-product of the World War. The question was: what could it do?
The ICRC had not been represented in Russia during that war, any more than in the other belligerent states. But it happened that Édouard Odier, the Committee’s Vice-President, had for several years represented Switzerland in Petrograd.

Alarmed by the collapse of the Russian Red Cross in the spring of 1918, Odier took the initiative of appointing a Swiss citizen who lived in Russia, Édouard Frick, as ICRC delegate. Frick had worked as a volunteer with the Russian Red Cross since December 1914.  

The Committee confirmed the appointment on 7 May, giving its delegate instructions which allowed him considerable freedom of action:

The essential purpose of the mandate we entrust to you is to help the Red Cross of Russia, so that the humanitarian activities protected by the Geneva Red Cross may continue there, despite the changes which have occurred in the country. But we cannot venture to specify in any way the form they should take.

The new delegate’s first concern was to try to preserve what was left of the Red Cross in Russia.

Founded in 1867, the Russian Red Cross had grown remarkably. From the start of the First World War it had run a network of dispensaries and hospitals, as well as hospital ships and trains. It had a large staff and many warehouses. But it also suffered from the same defects as the imperial administration: inefficient bureaucracy, corruption and nepotism. Furthermore, it was controlled by members of the aristocracy, and after the Tsar’s abdication the Society’s leaders were replaced by people who knew little about its workings. Like all major Russian institutions at the time, it soon began to crumble; its employees fled and its warehouses were ransacked. In the border regions, local branches were reconstituted as independent Societies. Just like the empire itself, the Russian Red Cross fell apart.

After the October Revolution the central directorate of the Red Cross fell out with the new Soviet authorities. In a decree dated 6 January 1918, the Council of People’s Commissars announced that Red Cross property had been taken over by the Russian Republic, that the central administrative committee had been dismissed and that a council had been appointed to submit a plan for reorganization of the Society. Several members of the central directorate were arrested, and the head of the Prisoners Commission was assassinated.

The consequences soon made themselves felt. After fighting broke out again on 18 February, the Central Powers promptly seized all Red Cross property they could lay their hands on: as it now belonged to the state, they saw it as part of the spoils of war. Many hospitals, trains and ships were lost in this way. As for the Reorganization Committee, it seems that its main concern was to dismiss the staff and sell off the Society’s assets.

By stressing the international nature and role of the Red Cross, Édouard Frick managed to convince the Society’s new leaders of the need to maintain what was left of the Russian Red Cross. His first achievement took shape in
the publication of a new decree, which supplemented that of 6 January and stated that the Russian Red Cross,

as a special section of the international association of the Red Cross whose activity is based on the Geneva Conventions of 1864 and 1907, has not ceased to exist and retains all the prerogatives of the Russian Red Cross Society as a section of the International Society.\textsuperscript{38}

This was only a first step. After further talks with the Society’s Council and the government, Frick was invited to join a commission set up to draft a decree on the reorganization of the Russian Red Cross and its position within the international Red Cross movement.\textsuperscript{39} It seems that the draft proposed by Frick was used as the basis for the decree of 2 June 1918, which is reproduced here in full:

The Council of People’s Commissars of the Russian Socialist Federal Soviet Republic informs the International Committee of the Red Cross in Geneva and all the Governments which have acceded to the Geneva Convention that this Convention in its first version as well as in subsequent versions, and all the other Conventions and international agreements relating to the Red Cross to which Russia was an adherent until October 1917, are recognized and will be maintained by the Russian Soviet Government and that the Red Cross Society retains all rights and prerogatives based on the said conventions and agreements.

As a result of the changes which have taken place in the organization of the Red Cross, details of which will be communicated at a later date to the International Committee of the Red Cross and the governments which have acceded to the Geneva Convention, the supreme body of all the Red Cross organizations is the Committee for the Reorganization of the Russian Red Cross Society, former Ermitage-Olivier building, Trubnaya Square, Moscow.

This Committee has been made responsible by the Russian Government for fulfilling the obligations arising out of the Red Cross functions. It enjoys all rights and prerogatives under the Geneva Convention and other international agreements.

Now that peace has been concluded, the special mission of the Red Cross is to give aid to the German, Austro-Hungarian and Turkish prisoners of war in Russia. For this purpose, the Russian Government has ordered the Russian National Society to devote all its energies to assisting the prisoners of war and to use all means available to help them.

The Moscow Committee for Assistance to Prisoners of War (302 Krasnaya Srednii Riady Square) forms part of the National Society and has not ceased its activities directed towards assisting the prisoners of war in Germany, and continues to enjoy all rights and prerogatives recognized under the international conventions and special agreements of the various Red Cross institutions and to fulfil all the functions which it exercised previously. It has been specially ordered by the Russian Government and the Red Cross Society to devote all its energies to assisting prisoners of war held in other countries, and possesses the greatest measure of autonomy in this respect.

The Russian Government and the Russian Red Cross Society request the International Committee of Geneva and all existing Red Cross Societies and all
governments which have acceded to the Geneva Convention to provide help and support and assistance to this Committee.

The Russian Government, convinced of the exceptionally grave nature of the question of prisoners of war, considers it necessary to inform the governments and organizations concerned that it has created a special body entitled ‘Administrative Committee for Prisoners of War and Refugees in Moscow’ (no. 43 Balshaya Nikitskaya Street) empowered to exercise all government functions relating to prisoners of war, civilian prisoners and refugees.40

The importance of this decree should not be underestimated: at a time when the Soviet government was denouncing all political, economic and military treaties concluded by the imperial government, it nevertheless recognized the immutability of its humanitarian commitments. It confirmed its intention to remain a member of the international Red Cross, thereby underlining the universality of the movement’s fundamental principles.41

For the time being, the decree guaranteed the existence of a Red Cross Society in Russia – but that Society had to be completely reorganized.

To this end, Frick brought together members of the Reorganization Committee, as well as representatives of the Danish, Norwegian and Swedish Red Cross Societies, which had large delegations in Russia, in an ad hoc body called the ‘International Conference of the Red Cross’.42 It was through this group, of which he was the driving force, that Édouard Frick accomplished his work.

The main activities of the ‘International Conference’ were:

- to reorganize the Red Cross in Russia;
- to protect Russian Red Cross property and installations held by the Central Powers;
- to protect and assist German, Austro-Hungarian and Turkish prisoners of war in Russia and Russian prisoners held by the Central Powers, mainly by sending mixed commissions made up of representatives of the Russian Red Cross and of neutral Societies to visit prisoners of war and distribute relief;
- to form two committees, in Moscow and in Petrograd, to provide assistance for detainees held in prisons;
- to send a mission composed of members of the Swedish and Danish Red Cross Societies to Siberia to take relief supplies to the civilian population and to prisoners of war there;
- to send a mission to the authorities in Siberia to seek the release of hostages held by the White Guards and to locate children from Moscow and Petrograd who had been staying in the Urals and were unable to return home (as it turned out, these children were evacuated eastwards and were eventually brought back to Russia by the American Red Cross, after travelling all the way across Siberia, the United States and Europe!);
- to combat epidemics, in particular by sending a large medical team to the Caucasus; the team was placed under the protection of a joint delegation
of the Danish Red Cross and the International Committee, whose representative appointed by Frick was a fellow Swiss, Paul Piaget.43

Most noteworthy here is the work carried out in the prisons, for it was in fact the first time that the International Committee had tried to intervene on behalf of people detained in connection with an internal conflict. Above all, it was an assistance operation, as the food crisis, the general shortages and the overcrowding in the prisons had left the inmates in desperate need. The ‘Conference’ distributed food, medicines, clothing, shoes, books and various other relief items. The operation was designed first and foremost to help foreign detainees, regardless of why they were imprisoned. However, the delegates were authorized to visit prison infirmaries, as well as jails where Russian prisoners were held alongside foreigners; the improvements they requested were consequently of benefit to Russians and foreigners alike.44

‘Conference’ delegates appear to have won permission for monthly visits to the detainees, plus distributions of necessities on a more frequent basis.45 It can be seen from a report on a visit made by Dr C. Martini and Dr J. Boss which was addressed to the People’s Commissar for Justice, that the delegates carried out the visits very much in line with the customary procedure for visits to prisoners of war.46

Édouard Frick returned to Geneva in October 1918. He expected to be away from his duty station only for a few weeks to enlist support for the Russian Red Cross and to find solutions to the problems faced by the prisoners of war. But he never went back to Moscow.47

Frick had barely arrived in Switzerland when the Armistice was signed, changing the whole situation. It was now the turn of the Central Powers to slide into chaos, leaving the Russian prisoners they held on the brink of catastrophe. The prisoner-of-war camps were no longer supplied, either by the detaining powers, which were still blockaded and where the food crisis was worse than ever, or by Russia, then deep in the throes of civil war.48 Thousands of prisoners took to the roads in the hope of reaching home on foot; many died on the way, from hunger or exhaustion. At the same time the decision-making capacity now lay elsewhere, as the Armistice had transferred responsibility for the fate of Russian prisoners to the Allied Powers.

The Committee therefore decided to send Frick to Paris to submit a plan to the Allies for supplying, and ultimately repatriating, the Russian prisoners. Once the Allies had given him the requisite assurances of financial backing for the ICRC, the Committee put Frick in charge of mounting and coordinating its relief operation for Russian prisoners of war.49 In fact, he soon became the overseer of all the Committee’s operations in eastern Europe and spent the following three years travelling between Geneva and the ICRC missions in Berlin, Warsaw, Riga, Reval (present-day Tallinn), Prague, Vienna, Budapest, Bucharest, Kiev and elsewhere.

But because of this new assignment, the post in Moscow remained vacant just at a time when relations between the Committee and the Soviet author-
ities entered a critical phase. After Frick’s departure the ‘International Conference’ soon collapsed; it was dissolved, and its offices ransacked, in June 1919.51

Two questions soured relations between the ICRC and the Soviet government. The first was that the authorities considered the reconstituted Russian Red Cross as the continuation of the Society founded in 1867, for the decree of 6 January 1918 had dissolved the Central Committee without abolishing the Red Cross as a corporate entity. The authorities therefore argued that the Russian Red Cross should be allowed to enjoy the same prerogatives as any recognized National Society.

But the International Committee found itself faced with rival claims, from the Soviet-backed society on the one hand and from the former leaders of the original Society on the other, which had been set up again both in the area held by the counter-revolutionary forces and abroad. Furthermore, societies using the red cross emblem had been formed in parts of the old empire, such as Finland, the Baltic states, Ukraine and Georgia. While the ICRC was ready to co-operate with all Red Cross bodies which carried out humanitarian activities, it was not prepared to grant recognition to any society before the situation in Russia had stabilized.52

The second difficulty concerned the two-and-a-half million Russian prisoners of war held in the former Central Power territories, who constituted a major reserve of trained manpower which both sides in the Civil War wanted to exploit. Both the Soviets and their enemies demanded that these prisoners be returned to them.

The Committee believed that the repatriation of prisoners of war should not be contingent on political considerations, and that the captives should be sent either back home or to whichever part of Russia they chose.53

Nonetheless, although the Committee never took part in any forced repatriations, the simple fact that it was assisting Russian prisoners of war at a time when the only prisoners of war who could be sent home returned to areas controlled by the White armies was enough to give the impression that the ICRC was helping the enemies of the revolution.

One cannot help feeling that, by not sending Édouard Frick back to Moscow, by not appointing a successor and by failing to inform the Soviet authorities of the reasons why Frick had been assigned elsewhere, the Committee showed a lack of tact towards a government whose sensitivities were all the more acute because the rest of the world refused to deal with it.

It was not until July 1919 that the Committee decided to send a new mission to Moscow to resume contact with the Red Cross and the government.54 But just as the delegation, led by Major Léderrey, was about to leave, Soviet radio announced that the delegates would not be allowed into the country.55

Renewed contact was vital. Early in 1920, the Committee decided to send Édouard Frick to Copenhagen to meet the Deputy People’s Commissar for Foreign Affairs, Mr Litvinov.56 For unknown reasons, however, the meeting
did not take place. The Committee then wanted Frick to go to Moscow – but this attempt also failed. In a letter dated 12 June 1920, the chairman of the Russian Red Cross Central Committee, Dr Soloviev, justified the Soviet authorities’ refusal on the grounds that Frick had been to Kiev, which was then held by counter-revolutionary forces, and had taken up contact with representatives of the former Red Cross organization. Frick was also seen in a poor light by the government because of his role in the repatriation of Russian prisoners of war.57

In opposing the sending of an ICRC mission, the Russian Society also raised the issue of the ICRC’s refusal to recognize it formally.58 It was only in October 1921, after granting this recognition, that the ICRC was able to send a delegate to Moscow.59

Finally, it should be noted that at the end of the Civil War the Committee did a great deal not only to help the large numbers of refugees who poured into Turkey, eastern Europe and China,60 but also to assist the victims of the appalling famine which struck large areas of Russia in 1921.61

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What conclusions can be drawn from this operation, the ICRC’s first confrontation with civil war? Quite clearly, the results were mixed.

While there were some resounding successes – foremost among them Édouard Frick’s contribution to the decree of 2 June 1918 and to the reform of the Russian Red Cross – there were also some serious setbacks. The ICRC was unable to play its part as a neutral intermediary between the opposing sides.

This failure was largely due to the refusal by each belligerent to acknowledge any legitimacy for the others and to observe the laws and customs of war in their relations. Each side demanded exclusive recognition and challenged the ICRC’s right to deal on equal terms with its opponents.

Yet it was equally due to the deep reciprocal mistrust felt by the International Committee and the new Soviet authorities; this was made worse by the fact that the ICRC did not manage to dissociate itself sufficiently from the Allied Powers, which actively supported the enemies of the Soviet regime.

Finally, the fact that the Committee was not represented in Moscow during the most crucial period of the Civil War – 1919 and 1920 – turned out to be an insuperable handicap. As the Committee had to admit: ‘Neutrality between the parties is far more difficult to maintain and to have accepted than neutrality between nations’.62

Yet the setbacks suffered by the Committee were just as vital as its achievements in showing the importance of Red Cross intervention in civil wars and the need to establish a basis for it. The Washington Conference had studied the question without reaching any decision. Since then, events themselves had provided the answer. By a strange twist of fate – not uncommon in history – Red Cross intervention was at last demanded by those who, at Washington, had been its fiercest opponents.
The need had been demonstrated; it remained only to draw the conclusions. The ICRC did so in its report to the Tenth International Conference of the Red Cross, which met in Geneva in 1921:

The efforts of the International Committee and those of other neutral representatives in Russia and Hungary have proved that:

1. in the event of civil war it is possible to persuade new governments which are being organized of the supranational value of Red Cross institutions and activities;
2. action by neutral delegates, and possibly by a supranational body whose members do not go beyond their capacity as delegates of the Red Cross, may greatly help to ease relations between Red Cross institutions which have remained active or those of the various parties to the conflict and may even succeed in bringing these parties to acknowledge the apolitical and purely humanitarian character of all activities carried on under the Red Cross flag.

Since civil war, when prolonged, gradually but inevitably becomes merely war, it seems that the two possibilities described above deserve to be officially adopted by a decision of an International Conference proclaiming the indispensable role of the Red Cross in a civil war.63

It was now up to the Tenth International Conference to confirm that ‘indispensable role’ of the Red Cross.

5. The Tenth International Conference of the Red Cross (Geneva, 1921)64

Was the Red Cross authorized to assist the victims of an insurrection or a civil war? As mentioned above, this question which the Washington Conference had left unresolved was answered by subsequent events.

Nine years lay between the Washington Conference and the Tenth International Conference of the Red Cross, which met in Geneva in 1921. Those nine years had witnessed not only the First World War but also the Russian Civil War, revolution in Hungary and the Spartacist uprising in Germany, to name only the major events. In all these situations the Red Cross had intervened without hesitation.

The authority of the Red Cross to assist the victims of uprisings and civil wars was henceforth accepted as a matter of principle. In including this item on the agenda of the Tenth Conference, the sole intention was to determine precisely when and how such an intervention should take place.65

Reports were submitted to the Conference by the Red Cross Societies of Germany, Finland, Italy, Poland, Portugal, Russia (the former organization) Turkey and Ukraine.66 Except for the Italian Red Cross, all these Societies had had to face situations of civil war or internal disturbances. The ICRC itself had devoted a chapter of its Rapport général to its work in Russia and Hungary.67
While the experiences described in them varied widely, the National Societies’ reports showed a remarkable unanimity on some important points. The authority of the Red Cross to assist victims of civil wars or disturbances was taken for granted; it was not a right which the Red Cross claimed for itself, but a prerogative whose possession by the Red Cross was acknowledged. It therefore followed that no legal or political consideration could inhibit Red Cross work for the victims of internal strife. Similarly, any distinction between civil wars or internal disturbances was irrelevant; the reports by the National Societies covered not just situations of civil war, but all kinds of insurrection, rebellion and revolutionary disturbances. No line was drawn between these different categories – the only criterion seemed to be the existence of victims resulting from armed clashes that were political in origin.

Naturally, Red Cross work had to observe the principle of impartiality: assistance had to be given to all victims without regard to their class or political views. ‘The Red Cross only helps human beings and is not interested in their political, civic or religious opinions, their race, class, social position, culture or anything else, other than their humanity’, wrote the Italian Red Cross.

It was felt that the responsibility for helping the victims lay first and foremost with the National Society of the country engaged in civil war. To have any chance of succeeding, the Society had to remain completely independent of the authorities and of the opposing parties; it should recruit its members and volunteers from all classes and all sides of the political spectrum. The example of the former Russian Red Cross could not be ignored: once the revolution started, the Society had fallen apart because of its links with the imperial family and the old ruling classes.

But was it realistic to expect that a National Society of a country engaged in civil war would be able to stand apart from the opposing factions and carry out its task, even when the state itself was lapsing into chaos? This was frankly asking too much. What was needed was the intervention of an international and neutral body, capable of carrying out humanitarian work at national level and, where necessary, maintaining the independence and inviolability of the Red Cross in its relations with the rival factions. This could be done only by the International Committee.

Finally, it was generally agreed that assistance had to be properly organized at international level. Direct intervention by a foreign National Society in a country engaged in civil war would amount to unacceptable interference and could lead to abuses; it was equally unacceptable that one side or the other should ask for help from the Societies of foreign countries. The organization of international relief therefore had to be entrusted to an independent and neutral body which would guarantee the impartiality of the assistance given.

It was obvious that the International Committee would be called on to carry out this role: ‘The indispensable and natural intermediary in such cases would be the International Committee’, stated the German Red Cross.
The National Societies’ reports laid great store by the International Committee, which was seen both as the pivot of efforts to arrange international assistance and as the substitute whereby the humanitarian work of a paralysed National Society could be continued within its country. These were the conclusions of the German, Italian, Ottoman and former Russian Societies; the Polish Red Cross, for its part, proposed that the composition of the ICRC be altered to include representatives of every National Society, and that in the event of civil war it would simply take over from the National Society concerned.79

The Societies’ reports were examined by Commission III of the Conference, whose conclusions were presented by Professor Rossi-Doria.80

The professor began by recalling that the Washington Conference had been unable to reach a decision on the question of Red Cross intervention in civil wars, because of the refusal by some governments to accept that wounded or sick rebels be protected by the Red Cross flag, and receive assistance. But times had changed, he said, and ‘events of tragic proportions’ imposed a new perspective: it was not so much a case of protecting rebels by allowing them to benefit from the Geneva Convention, as of helping ‘those huge numbers of innocent victims resulting from civil war’.81

In reality, he went on, the Red Cross had been transformed: it could no longer confine its work to helping wounded and sick soldiers, but had to assist all victims of human violence or of nature’s savagery.82

The Red Cross was therefore duty-bound to help the victims of internal strife as well. It had done so, and no one could any longer contest its right to protect the victims of a civil war, whatever side they belonged to.83

But the Red Cross had to be sure to assist all victims, without exception; it therefore had to act with total independence and refrain from taking sides.84

These thoughts led to three conclusions:

a) The Red Cross had the right and the duty to assist all victims of civil war.
b) It was first of all the duty of the National Society of the country concerned to provide this help; the independence and freedom of action of that Society had to be fully respected.
c) The ICRC was responsible for organizing international relief.85

Commission III’s conclusions were endorsed without debate by the Conference, which went on to adopt six resolutions, three of which were proposed by the Commission and three by the former Russian Red Cross. Together, they formed Resolution XIV of the Tenth International Conference of the Red Cross:

General Principles:

I. The Red Cross, which transcends all political and social distinctions, and differences of creed, race, class or nation, affirms its right and duty of affording relief in case of civil war and social and revolutionary disturbances.
The Red Cross recognizes that all victims of civil war or of such disturbances are, without any exception whatsoever, entitled to relief, in conformity with the general principles of the Red Cross.

II. In every country in which civil war breaks out, it is the National Red Cross Society of the country which, in the first place, is responsible for dealing, in the most complete manner, with the relief needs of the victims; for this purpose, it is indispensable that the Society shall be left free to aid all victims with complete impartiality.

III. If the National Red Cross cannot alone, on its own admission, deal with all the relief requirements, it shall consider appealing to the Red Cross Societies of other countries, in conformity with the following general principles:

a) Requests for foreign assistance cannot be accepted from one or other of the parties in conflict but only from the National Red Cross Society of the country devastated by the civil war; such requests must be addressed by it to the International Committee of the Red Cross.

b) The International Committee of the Red Cross, having ensured the consent of the Government of the country engaged in civil war, shall organize relief, appealing to foreign relief organizations.

Should the Government in question refuse its consent, the International Committee of the Red Cross shall make a public statement of the facts, supported by the relevant documents.

Exceptional cases:

I. When, following the dissolution of the National Red Cross Society, or by reason of the inability or unwillingness of such Society to request foreign aid or accept an offer of relief received through the intermediary of the International Committee of the Red Cross, the unrelieved suffering caused by civil war imperatively demands alleviation, the International Committee of the Red Cross shall have the right and the duty to insist to the authorities of the country in question, or to delegate a National Society to so insist, that the necessary relief be accepted and opportunity afforded for its unhindered distribution. Should the authorities of a country refuse to permit such relief intervention, the International Committee of the Red Cross shall make a public statement of the facts, supported by the relevant documents.

II. Should all forms of Government and National Red Cross be dissolved in a country engaged in civil war, the International Committee of the Red Cross shall have full power to endeavour to organize relief in such country, in so far as circumstances may permit.

Resolutions:

1. The Xth International Red Cross Conference approves the above proposals and recommends them for study to all National Red Cross Societies.

2. The Conference recommends that, in agreement with the International Committee of the Red Cross, all Red Cross Societies should undertake intensive propaganda to create in all countries an enlightened public opinion, aware of the complete impartiality of the Red Cross, in order that the Red Cross may enjoy throughout the world, on all occasions and without any exception, the confidence and affection of the people without distinction of
party, creed, class or persons, which are indispensable conditions to enable the Red Cross to accomplish its tasks fully and to secure the most effective safeguard possible against any violation of Red Cross principles in the event of civil war.

3. The Xth International Red Cross Conference entrusts the International Committee of the Red Cross with the mandate to engage in relief in the event of civil war, in accordance with the above prescriptions.

4. The Xth International Red Cross Conference, recalling the distressing experiences of the Red Cross in countries engaged in civil war, draws the attention of all peoples and Governments, of all political parties, national or other, to the fact that the state of civil war cannot justify violation of international law and that such law must be safeguarded at all cost.

5. The Xth International Red Cross Conference condemns the political hostage system, and emphasizes the non-responsibility of relatives (especially children) for the acts of the head or other members of the family.

6. The Xth International Red Cross Conference deplores the unlimited suffering to which prisoners and internees are sometimes subjected in countries engaged in civil war, and is of the opinion that political detainees in time of civil war should be considered and treated in accordance with the principles which inspired those who drew up the 1907 Hague Convention.

Three major points emerged from the debates of the Tenth International Conference.

a) There is no doubt that the Russian Civil War dominated people’s thinking; though there were few direct references to the recent conflict, the allusions to it were sufficiently clear. Resolution XIV can therefore be seen as the Red Cross reaction to the horrendous sufferings endured by the Russian people, as well as an attempt to draw a lesson from the efforts of the Red Cross to assist the victims of this unprecedented civil war.

b) Despite its ponderous style, Resolution XIV should not be underestimated: it is one of the most important texts in the history of the Red Cross, opening up new possibilities of action in a field which international law had failed to codify, i.e. civil war. For more than a quarter of a century this text – and it alone – served as the basis for Red Cross work to help the victims of internal conflicts.

c) The resolution confirmed, in unmistakable terms, the position of the International Committee, to which the Conference entrusted ‘the mandate … to engage in relief in the event of civil war …’. The Committee was therefore not only the pivot of relief efforts in such situations, but would act as the agent for the whole movement.

Less than two months later, events in Upper Silesia were to show the importance of this resolution.
6. The conflict in Upper Silesia (1921)\textsuperscript{87}

Under the terms of Article 88 of the Treaty of Versailles, the population of Upper Silesia – an inextricable mingling of Germans and Poles – was to decide in a plebiscite whether the province would remain within the German Reich or would be attached to Poland. While waiting for this vote to take place, the territory was placed under the authority of an Inter-Allied Commission.

Polling on 20 March 1921 resulted in a pro-German majority, but the outcome was challenged by the pro-Polish party, which claimed the vote had been distorted by the participation of a large number of German immigrants. On 2 May the leader of the Polish party, Korfanty, called for an uprising; the Germans responded by forming a corps of irregular forces under the command of General Höfer.

It was not until the following July that Allied forces succeeded in restoring order. On 12 October the Council of the League of Nations ordered that the province be divided, with the northern and western regions remaining German, and the south allotted to Poland.

Opinion was divided as to whether the dispute could be strictly termed a conflict. Yet there hardly seems any room for doubt: the intensity of the fighting, the existence of organized groups and of prisoners taken by each side were clearly the marks of an armed conflict. But it was not an international one, as the two countries directly concerned – Germany and Poland – did not take part in the fighting. The affair was unquestionably a civil war between two factions, with the Inter-Allied Commission trying to act as mediator.

Whatever the nature of the conflict, the Red Cross was certainly faced with one of those ‘exceptional cases’ foreseen by Resolution XIV of the Tenth International Conference.\textsuperscript{88} The head of the Inter-Allied Commission, General Le Rond, forbade the German and Polish National Societies to work in the plebiscite territory.\textsuperscript{89} The International Committee was, therefore, the only Red Cross institution which might be able to help the victims. All conditions for an ICRC intervention were fulfilled.

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On 23 May 1921 the Committee contacted the Polish and German Red Cross Societies, as well as General Le Rond. The two Societies made it clear that they were unable to act because the borders had been closed. Le Rond, on the other hand, asked the ICRC to send a delegation to the Silesian town of Oppeln.\textsuperscript{90} The position he took then was maintained throughout the period of instability:

The International Red Cross is the only Red Cross authority which may be called upon to take immediate action to relieve the victims of the conflict, which is not, strictly speaking, a civil war, since the dispute is between two governments issuing
conflicting claims to a territory at present placed under the sovereignty of an Inter-Allied Commission. Soon after, on 28 May, Lucien Cramer and Lucien Brunel left Geneva for Oppeln to set up an ICRC delegation there, which remained operational until 4 October. Its main activities were:

- the protection of prisoners;
- the exchange of prisoners;
- the tracing of missing persons;
- the evacuation of civilians;
- the protection of medical services.

With the blessing of the Inter-Allied Commission, the delegates quickly contacted the leaders of the opposing factions to arrange for visits to the prisoners they held. Korfanty authorized the delegates to ‘visit the prison camps without restriction and work there according to Red Cross principles’. General Höfer likewise offered every facility to help the delegates’ work. However, as the prisoners taken by the pro-German forces had been transferred to Germany, permission also had to be obtained from Berlin. This was received on 2 June.

The visits began immediately and revealed that the prisoners were suffering from hunger, cold and a lack of medical care:

Prisoners and internees of all kinds who are held in camps and with whom the delegates of the International Committee of the Red Cross have been able to speak in private are suffering from hardships and hunger, as their guards have no means of feeding them properly. Lacking bedlinen and clothing, the prisoners also suffer from the cold nights in the sheds where they are kept. The delegates have observed that, despite the good will of the doctors responsible for health care, there is insufficient medicine and equipment. Under the circumstances, these unfortunate prisoners should be released as soon as possible.

This view was shared by the leaders of the opposing sides. However, negotiations for the exchange of prisoners could not begin, as the Inter-Allied Commission refused to deal with Korfanty, whose authority it did not recognize. It also refused to receive from the German government those prisoners who had been transferred to Lower Silesia or Saxony, since it considered their deportation to have been illegal. The stalemate was complete.

The Inter-Allied Commission therefore gladly accepted the suggestion that the ICRC delegation be made responsible for organizing an exchange, and informed the German government accordingly:

The Inter-Allied Commission ... is unable to take charge of the internees whom the German government has offered to release into its custody, but nonetheless wishes to end this state of affairs at the earliest possible occasion. [The Commission] proposes that these persons be handed over by the German government to delegates of the International Red Cross of Geneva, properly accredited in Upper Silesia. These will ensure that the internees are sent home as and when possible.
With this mandate, the ICRC delegates opened negotiations with the Polish party, General Höfer and the German government. The exchange began on 16 June and continued at regular intervals, securing the release of 1796 Germans and 1824 Poles. Three medical convoys were organized for the repatriation of severely wounded prisoners. 

The delegation also received a great many tracing requests concerning prisoners or missing persons. Neither of the insurgent parties had an information bureau of the kind governments were obliged to open under the terms of Article 14 of the Hague Regulations, so the delegation set up a tracing bureau with which two members of each National Society – German and Polish – were invited to co-operate. This mixed commission furthermore undertook to trace political detainees and prisoners of all kinds, who were held throughout the territory and who had not been included in the initial exchanges, and opened a total of 5674 enquiries, of which 5158 were completed successfully.

The ethnic German population of the territory’s towns were cut off from food supplies, since the Polish insurgents held the countryside and had closed the main roads. With the consent of both sides, the delegation organized trains to evacuate women, children, the sick and the elderly from the besieged towns; these trains ran under the ICRC’s protection, using its distinctive emblem.

The delegation’s other main task was to try to protect the medical services. As the troops of the opposing sides were not regular armed forces, their medical services were not covered by the Geneva Convention of 6 July 1906. Moreover, under the terms of the Convention, only the ‘competent military authority’ had the right to issue medical personnel with duly validated armbands; in the case in question, the competent military authority appeared to be the Inter-Allied Commission, as the territory’s governing body. The commission, however, refused to grant recognition of any kind to the insurgents.

The International Committee therefore submitted a draft declaration to both parties in which they pledged to respect all provisions of the Geneva Convention. The Committee itself proposed issuing special armbands to registered members of the medical services on both sides; these would bear the red cross emblem and the Committee’s official stamp, and be marked ‘Upper Silesia’. The draft declaration was accepted by both Korfanty and Höfer; the armbands, however, were never issued because hostilities came to an end at about the same time.

Few delegations had enjoyed such clear and prompt success as the one in Upper Silesia. In visiting prisoners and arranging their release, in setting up a tracing and information service, in organizing evacuation convoys and, above
all, in getting both sides to agree to respect the Geneva Convention, the ICRC appears to have achieved all the objectives for which its services had been requested.

This result was not due solely to the competence of the delegates and the support they received from the Inter-Allied Commission. The success showed what could be achieved, in a poorly defined legal situation, by a purely humanitarian organization capable of establishing relations with all the parties, regardless of their legal status and without those relations being interpreted as affecting the respective positions of those parties or as some form of recognition.

In any conflict, the crucial factor is the will of the belligerents to find solutions to humanitarian issues. They then have to find a well-intentioned intermediary able to restore the contacts which the hostilities have severed. Legal reasons prevented the Inter-Allied Commission from performing this role in Upper Silesia and brought it to a standstill; on the other hand, the relations which the ICRC delegates were able to establish with all parties placed them in a favourable position and allowed them considerable scope for action.

The success of the mission in Upper Silesia was a striking demonstration of the value of Resolution XIV adopted at the Tenth International Conference of the Red Cross.

The mission also set two important precedents:

a) The ICRC applied to an internal conflict the rules and operational principles it had developed during its work in international conflicts.

b) The parties to the conflict undertook to respect all provisions of the Geneva Convention.

The Committee was right, therefore, to see these precedents as the start of a new area of activity: ‘... the intervention of the International Committee of the Red Cross in all cases where, as the result of an insoluble or merely complicated political or social situation, regularly constituted governments are unable to take any practical action’.105

7. The Spanish Civil War (1936–9)106

Introduction

Shackled by its archaic structures and the memory of a glorious past, Spain remained unable to reconcile the contradictory forces within society: the struggle between the landed aristocracy and the business community, on the one hand, and the urban and rural proletariat on the other; the quarrel between the Church and the liberals; the rivalry between the centralized power of Castile and the autonomist aspirations of the provinces. Tensions built up everywhere, to be vented in sudden explosions of violence.
The Second Republic, proclaimed in 1931, was unstable and crisis-ridden. Lacking strong popular support, it embarked on a programme of political, economic and social reforms that merely increased opposition to it without managing to satisfy demands which had for so long been repressed. The victory of the Popular Front in the February 1936 elections brought the hostility of the old ruling classes to a head.

A military uprising took place on 18 July 1936, led by Generals Franco and Mola. It was successful in Spanish Morocco, Navarre, Old Castile and the main cities and towns of Andalusia, but it failed in the industrial centres of Barcelona, Madrid and Bilbao, and in the Basque country, Catalonia, New Castile and the Levante provinces.

Spain split into two opposing factions which remained locked for thirty-three months in a bitter struggle. On the Nationalist side were most of the army, as well as the aristocracy, senior churchmen and the Falange, a grouping of supporters of an authoritarian regime. The Republican side included the working classes, farm workers and what remained of the liberal bourgeoisie. In provinces loyal to the Republic, the abortive coup resulted in a shift of power to the unions and workers’ parties; the military revolt thus gave momentum precisely to the social revolution it had aimed to prevent. At the same time, the rising helped to bring long-demanded autonomy to the Catalans and Basques. In short, Republican Spain was breaking up into a multitude of power centres.

In the chaos that followed the military coup, the Nationalists had a major advantage – Spain’s Army of Africa, which was airlifted to the Spanish mainland with German and Italian help, and which enabled Franco to take the offensive. In the space of a few weeks the Nationalists managed to link up the provinces they controlled, but their advance on Madrid was halted by the fierce resistance of the workers’ militia, who were soon reinforced by the International Brigades. With the establishment of an unbroken front, Spain found itself cut in half, each side controlling territory and possessing a military and political organization. The lightning strikes of the opening days were succeeded by set battles conducted by ever-larger forces.

The Spanish Civil War must be seen in the context of a Europe that was itself moving towards a new general conflict. From the start, Germany and Italy offered the Nationalists aid which was to prove decisive. The Soviet Union supplied the Republicans with the arms they needed, while the Comintern recruited volunteers for the International Brigades. Britain and France were above all concerned with preventing the war from sparking off a new European conflict, and at their instigation a ‘Non-Intervention Committee’ was formed. Its proceedings – which will remain a showpiece of hypocrisy and deceit – did nothing to prevent further supplies of troops and arms from Germany and Italy; the USSR soon simply disregarded it. Spain became the training ground for the Second World War.

By humanitarian standards, the conflict took a disastrous turn from the start. The 18 July rising and its partial failure had the effect of unleashing all
the pent-up hostility in Spanish society, and hostage-taking, the wanton killing of opponents and suspects, the execution of prisoners and a rising tide of reprisals became commonplace on both sides during the early months. The disintegration of authority led to the settling of old scores and personal vendettas. Violence and hatred were given full rein, and human life seemed to have suddenly become worthless.

Only very gradually was authority restored on either side, curbing the violence; but the war remained marked to the end by extreme brutality. At the front, the combatants fought with astonishing ferocity, in a spirit of sacrifice noted by all observers but with a distinct contempt for human life. Behind the lines, the security services which were hunting down suspects were rarely controlled by any higher authority and resorted to the most cruel methods. At the end, the repression that followed the Nationalists’ victory was like the war itself: it was ruthless and deadly.107

The legal framework

The Geneva and Hague Conventions, which covered international conflicts, were not directly applicable to the Spanish Civil War. Furthermore, the parties to the conflict adamantly refused to recognize a state of belligerency, although such recognition would have allowed most of the laws and customs of war to be applied and although their implementation was fully justified by the circumstances of the conflict.108 The belligerents failed – or did not even try – to reach agreement on observing the rules of war, an agreement which would have only slightly curtailed their freedom of action but greatly reduced the hardships of the war. Generally speaking, the conflict was characterized by a callous disregard for the laws and customs of war and humanitarian principles.109

The only instrument that the International Committee had at its disposal was Resolution XIV of 1921,110 but as a resolution adopted by a Red Cross Conference, this was not binding on the belligerents. The ICRC’s first move was, therefore, to try to obtain formal pledges by both sides that they would observe the basic principles of humanitarian law and the law of war. This was the primary objective of the mission carried out by Dr Marcel Junod.111

Dr Junod’s mission

As soon as the conflict began, several Red Cross Societies asked the ICRC how they should react with regard to the ‘tragic events in Spain’ and what action it was planning to take.112

Under Resolution XIV of the Tenth International Conference, it was first of all up to the National Society in the country engaged in civil war to deal with the situation. The ICRC therefore contacted the Spanish Red Cross to offer the assistance of other Societies. A few days later, it again approached both parties to the conflict, asking them for information about the activities of the Spanish Red Cross and about arrangements for caring for the
wounded; the Committee also reminded the parties of Resolution XIV. As no reply was forthcoming, and anxious to get some firsthand information about the possibilities of taking humanitarian action, the ICRC decided to send Dr Junod to Spain (he had just completed his mission to Ethiopia).113

Junod went first to Barcelona, then to Madrid where he had talks with the President of the Spanish Red Cross, Dr Aurelio Romeo, and with the Prime Minister, José Giral. These meetings resulted in two agreements, or rather two unilateral declarations.114

In a letter dated 1 September 1936, Dr Romeo said that ‘after listening to the proposals made by the International Committee of the Red Cross regarding the civil war in Spain’, he approved the following arrangements:

The Central Committee of the Spanish Red Cross accepts all assistance offered by sister Societies abroad via the ICRC in Geneva; it will endeavour by every means at its disposal to ensure that the red cross emblem is respected; it will give its full support to the International Committee’s delegates in their requests to the Spanish government for permission to open information bureaux on civilian prisoners and prisoners of war, under the complete control of the ICRC delegates.

The Society further promised to give the delegates its moral and practical support.115

On 3 September, Prime Minister Giral stated that the Spanish government had consented to ‘the sending of a double delegation of the International Committee, delegations which will carry out their activities in Madrid and Barcelona, on the one hand, and in Burgos and Seville on the other’. Their mission would be to protect the emblem and ensure respect for it by both sides, and to facilitate the humanitarian work of the Red Cross. The government also agreed to the creation of information bureaux regarding military and civilian prisoners and accepted the possibility of exchanging certain non-combatant prisoners, in particular women and children.116

These two statements were of crucial importance in two ways: first, they signalled acceptance of the applicability, in an internal conflict, of certain rules of the law of war, in particular those concerning respect for the red cross emblem; secondly, they opened the door to ICRC activities on both sides.

Encouraged by this early success, Junod went to Burgos where he met the Count of Vallellano, head of the Red Cross Society formed in the Nationalist zone, and General Cabanellas, leader of the Nationalists’ supreme military command (Junta de Defensa Nacional). These talks resulted in two statements, similar to those of Madrid, concerning the acceptance of foreign assistance, respect for the emblem and the creation of information bureaux regarding civilian and military prisoners. General Cabanellas went on to declare that the ‘the Junta was prepared to observe and respect ... the Geneva Convention concerning the wounded, sick and prisoners’, and that it would allow, on a reciprocal basis, women, children and young people not liable for military service to leave Nationalist-controlled areas if they wished.117
So by the end of Junod’s mission the ICRC had obtained four statements which, by converging on certain points, amounted to a virtual agreement binding not between the parties to the conflict themselves but between each of them and the International Committee.

In fact, this agreement was narrower in scope than it appeared, since it covered only foreign assistance, respect for the emblem and the opening of information bureaux on prisoners. Provisions for prisoner exchanges were not identical and from the start revealed serious divergences. Furthermore, the reference made by the Junta to the Geneva Conventions was more an attempt to obtain some form of international status than a serious intention to abide by any legal commitments. The ICRC still felt, however, that the statements gave it sufficient grounds for starting a humanitarian operation on both sides.

Delegations were quickly established in Madrid, Barcelona and Burgos. More offices were opened during the autumn, and by the end of 1936 the ICRC had ten delegations (at Madrid, Barcelona, Valencia, Bilbao, Santander and Alicante, on the Republican side; at Burgos, San Sebastian, Saragossa and Seville, in the Nationalist zone). Each was run by one or two delegates, assisted by volunteers from the local branch of the Spanish Red Cross. Later, because of developments in the military situation, serious political problems and, above all, growing financial difficulties, the ICRC was gradually forced to reduce the number of its offices.

Thus, even though the Geneva Conventions did not provide any legal basis for its work, the ICRC was better represented in Spain than it had been in the Chaco War, during which it had carried out only temporary missions, or in Ethiopia, where it had been present on only one side.

The Committee’s main activities in Spain were as diverse as the forms taken by the conflict itself, which ranged from pitched battles to small-scale clashes, killing combatants and civilians without distinction. In those circumstances, it is not surprising that some of the ICRC’s objectives were achieved, while others failed because of the irreconcilable positions adopted by the belligerents.

It would be impossible to list all the many initiatives taken by Geneva and the delegations. However, the main activities can be grouped under three general objectives, namely:

- the protection of medical units;
- the protection of prisoners;
- the protection of the civilian population.

The protection of medical units

One of the tangible results of Dr Junod’s mission was the pledge given by the belligerents that they would respect the red cross emblem. The Committee considered, with some justification, that this pledge implied that both parties would apply, by analogy, the Geneva Convention concerning the wounded and sick.
The emblem was used by both sides to indicate military medical units, as well as civilian teams which were under the authority of the military medical service or which were likely to have to care for the wounded.

Throughout the conflict the ICRC was asked to inform the adversary where newly opened hospitals were located. These notifications led to a constant exchange of communications – probably one of the few which worked regularly between the opposing sides. Thanks to this, hospitals were largely spared the effects of the fighting.122

The ICRC was nonetheless approached many times with complaints about the shelling or bombing of medical units, or about other violations of the Geneva Convention. Contrary to its practice during international wars, it decided not to pass these protests on to the adverse party when it felt it was inopportune to do so; it preferred other means of trying to ensure the safety of medical installations. The Committee did not publish any of the complaints made to it.123

These occasional violations should not obscure the fact that, in general, medical units were respected:

A first point should be made: the value of the emblem of the red cross on a white ground is recognized and respected. The analogous application of the Geneva Convention to the civil war is generally accepted in practice by the opposing parties. This is shown not only by the notifications of hospital sites made to the International Committee, but also by the protests sent to the Committee by the Red Cross sections of each side regarding violations, or alleged violations, of the Convention.124

While medical units were generally respected by the combatants, captured medical personnel and Red Cross volunteers were almost always kept as prisoners, contrary to the provisions of Article 12 of the 1929 Convention. Attempts by the Committee to negotiate the release and return of doctors and nurses were ignored.125 The limits imposed by the belligerents on applying the Geneva Convention ‘by analogy’ are only too clear, as are the tight constraints placed on efforts to ‘humanize’ the Civil War.

Most of the doctors and nurses captured by the opposing sides joined the great mass of prisoners of war.

The protection of prisoners

The fate of prisoners remained the foremost humanitarian concern during the whole of the Civil War. There is little doubt that while no group of combatants or non-combatants were totally spared, the prisoners paid the heaviest price. For thousands of them, their cells were the antechamber to torture and death.

The law of war, which has developed in its present form from conflicts between states since the seventeenth century, is based on a fundamental distinction between combatants and non-combatants, rendered visible by a uniform or any fixed insignia which can be recognized from a distance. But
this fundamental distinction is virtually meaningless in a civil war which, by
definition, is a fratricidal struggle; in Spain, it was completely disregarded.
From the start of the rising on 18 July, there were mass arrests of combat-
ants caught bearing arms, of civilians who were suspect because of their pre-
vious political activities or simply because they belonged to a certain social
stratum, or of men and women who were victims of anonymous tip-offs or of
personal feuds. Many others, including women and children, were seized as
hostages, as a form of security or as bargaining chips.
These people were herded indiscriminately into makeshift prisons – the
holds of decommissioned ships, old forts, concentration camps hastily set up
in unhealthy places. The conditions were appalling – overcrowded, lacking
privacy and deprived of medical care.
The prisoners were moreover helpless prey to summary execution. In the
first few months of the war, special courts handed down thousands of death
sentences without giving the accused the slightest possibility of mounting a
defence. Thousands of prisoners were killed without trial and thousands of
others were executed as a means of reprisal.126
Faced with this paroxysm of violence, the ICRC had little to fall back on.
Protective activities such as those it had carried out during the First World
War seemed inconceivable, in view of the prison conditions, and ill-adapted
to the realities of the Civil War.
Nevertheless, this was the approach it adopted. As soon as the delegates
arrived, they sought access to the prisoners on both sides – and were refused.
However, the agreements reached in Madrid and Burgos allowed for the
opening of information bureaux on civilian and military detainees and, by
making individual enquiries and proposing exchanges of prisoners, the dele-
gates gradually gained access to places of detention. The aim of the initial
visits was simply to verify the presence of a particular detainee whose name
was known to the delegates, but further approaches to the authorities gradu-
ally enabled the delegates to overcome the obstacles and see all the prisoners
held in a particular place and, eventually, to repeat the visits with a certain
degree of regularity.127
The prison visits were never governed by a proper agreement which the
ICRC could use as a reference; everything depended on the belligerents’ good
will. But a certain ‘standard practice’ did evolve,128 so that by the end of
December 1938 the delegates had made occasional or regular visits to 82
places of detention in which some 89,000 prisoners were held.129
Whereas the Nationalist Junta abruptly stopped these visits in August
1938, the ICRC was able to continue visiting Republican prisons until the
end of the war.130
What did the visits achieve?
Needless to say, the ICRC could not put an end overnight to the unre-
strained hatred and violence which marked the war in Spain and whose
primary victims were the prisoners. Still, the Committee’s unremitting efforts
did in many ways ease their plight. In Bilbao, for instance, the ships with
some 1500 prisoners confined in their holds were first of all moved away from their quayside moorings, where they were in danger from the angry crowds, and anchored offshore; later, the inmates were transferred to a prison which was both more secure and cleaner. At Barcelona, prisoners held on former cargo vessels were moved to the fortress of Montjuich, where they were visited by ICRC delegates, and later to a proper prison. In other cases guards were replaced, infirmarys and even hospitals were set up, and in many instances family visits were arranged. There is little doubt that the visits and repeated representations made by ICRC delegates helped to improve the conditions of detention.  

Moreover, the visits enabled the ICRC to establish a prisoners’ information service. Messages from and to prisoners were specially scrutinized and registered in Geneva: the name and location of each prisoner was recorded, so that the ICRC had some idea, incomplete though it may have been, of the prison population. About 90,000 messages between prisoners and their families were exchanged across the front line by the ICRC.

A tracing service was also set up in each delegation. One of the purposes of visits to prisons has always been to trace missing persons, both to give them at least some protection by registering their existence and to reassure their families. The alphabetical card-index in Geneva contained some 120,000 names.

A certain amount of relief was distributed in the places of detention by the ICRC. At the beginning, it sought to equip the prison infirmaries to make good the lack of medical care, and surgical instruments, medicines, beds and sheets were provided to many camps and jails. Later, clothing and food parcels were distributed, but because of the financial problems faced by the ICRC in Spain material assistance was never available in sufficient quantities.

Despite the immense difficulties encountered in its prison-related activities, the ICRC managed to bring about a real improvement in the detainees’ conditions by means of its delegates’ approaches to the authorities, by setting up family message services or by providing material assistance.

Yet it could not feel satisfied: the results it achieved could not mask the fact that in many cases its delegates’ approaches were brushed aside and the most inhumane acts continued to be perpetrated.

In its visits to prisons, the ICRC came up against two particular obstacles. First of all, notwithstanding the efforts made by Geneva and the delegations, it was never possible to draw up a complete list of the prisoners’ names. Neither the Republicans nor the Nationalists had exact records of the people they were holding; in some cases, not even the people in charge of individual camps had an up-to-date list of their prisoners.

Yet the registration of prisoners is the first step towards protecting them. Hence the stipulation by the 1929 Diplomatic Conference, in Article 77 of the Prisoners-of-War Convention, that lists of prisoners must be supplied. In the Spanish Civil War these notifications were never made. Under
these circumstances the security of prisoners could not be guaranteed. The number of summary executions did diminish, but the practice never really ceased.

Nor were the delegates ever able, on either side, to visit all the places of detention. Whereas they could accomplish useful work in some prisons and camps, other places escaped all control and could be used for the worst atrocities. Moreover, a number of interrogation centres were run throughout the war by secret factions or groups unknown to either the Nationalist or Republican authorities. Little wonder, therefore, that the ICRC was unaware of their existence.

So while the Committee’s work in places of detention during the Spanish Civil War achieved far more than could have been hoped for at the start, it was never as effective as it could have been. This sombre fact illustrates the problems facing humanitarian operations which have no support in law.

There was, however, a further means of improving the lot of the prisoners, namely by proposing exchanges. The first such operation, involving the release of a Nationalist politician held at Bilbao and a Basque notable held at Pamplona, was carried out by Marcel Junod on 25 September 1936. During the following weeks delegates organized similar exchanges, in particular for women and children.

But in the absence of a general agreement, proposals for individual exchanges led to seemingly interminable negotiations whose results were usually disappointing. Proposals made by one side were inevitably challenged by the other, which in turn submitted a counter-proposal requiring renewed bargaining. Because of the large number of prisoners held on both sides and the ever-increasing political difficulties, the individual approach seemed less and less suited to the situation. Although the ICRC and its heads of delegation on both sides of the line did all in their power to continue the process, the number of people actually released was derisory compared with the total number of prisoners.

The Committee then tried to bring about a general exchange of civilian prisoners. On 27 March 1937, ICRC President Huber sent both sides a draft agreement defining the principles of a general exchange of non-combatant detainees, and setting out the procedure which might be followed.

The replies from the belligerents revealed serious differences of opinion. The initial proposal was set aside in favour of a system involving lists, the first aim being the release of 2000 prisoners on each side. These lists, drawn up by the belligerents, gave rise to new disagreements, so that the project constantly had to be reduced still further. In the end, the prolonged discussions led to just a few small-scale exchanges, each one bringing about the release of only a few dozen people.

From September 1938, negotiations for a general exchange of prisoners were conducted under the auspices of the British government, but again no overall solution was reached. The ICRC itself continued to deal with proposals covering the exchange of specific groups of prisoners.
All in all, the ICRC managed to secure the release of 674 civilians and soldiers\textsuperscript{142} – a disappointing outcome considering the lengthy efforts made throughout the war to free prisoners from captivity and constant fear, and a pathetic one when compared with the total number of prisoners.

But the success of these negotiations should not be judged solely by the number of prisoners exchanged. By keeping the negotiations going and by maintaining a regular exchange of proposals and lists, the Committee ensured a modicum of protection for thousands of prisoners who, without this, would probably have been killed. Many of them under sentence of death were granted a reprieve in anticipation of an exchange.\textsuperscript{143} Just as much as the prison visits themselves, the exchange negotiations helped to restore some value to human life, if only as a guarantee or bargaining chip to obtain the release of prisoners held by the other side.

However, beyond visits to prisons and the arduous efforts to negotiate exchanges, should not something have been done to put an end to certain practices which were rife during the first few months of the war – particularly the taking of hostages, which the Tenth International Conference had explicitly condemned?\textsuperscript{144}

The ICRC did in fact send a memorandum on 3 November 1936 to all parties to the conflict to protest in the strongest terms against the taking of hostages, which it described as ‘incompatible with the methods of warfare of civilized states’. The Committee stressed the respect to which women, children, the elderly and the sick, people who had not been involved in politics, and doctors and other medical personnel were entitled. It went on to remind the belligerents that reprisals must not on any account be taken against non-combatants and prisoners of war.\textsuperscript{145}

The memorandum – which was published – included proposals for ensuring the greatest possible freedom of movement for the civilian population and for allowing the exchange of non-combatant prisoners or their transfer to another country.\textsuperscript{146} But these proposals came to nothing.

It was a firm and courageous stand, but does not appear to have been enough to halt certain particularly abominable practices.

**The protection of the civilian population**

Heedless of the distinction between combatants and non-combatants, the Spanish Civil War brought severe hardships for the civilian population helpless in the face of food shortages, repression, threats of reprisals and bombing.

The ICRC had few cards to play to ensure the effective protection of civilians. All the same, various efforts were made on their behalf, which may be grouped in three categories:

- family messages;
- material assistance;
- protection against bombing.
Family messages

The Madrid and Burgos agreements had provided for the establishment of an information service for prisoners, but nothing similar had been arranged for civilians. Necessity brought it into being: the war had broken out in the middle of the summer, when many families were dispersed – women and children had gone to the mountains or to the seaside while their menfolk stayed behind to work, and thousands of children had been sent to holiday camps. Almost overnight, the war created a new border, keeping relatives apart who had separated for only a few days. As there was no postal service operating between the Nationalist and Republican zones, the ICRC set up a family message service similar to the one it had run during the First World War. This service was exempt from postal and telegraphic charges on both sides.147

Many enquiries could not simply be forwarded from one part of the country to another, but needed special treatment; these included requests to trace missing people or to arrange for evacuations, repatriations or family reunification, requests for documents and enquiries concerning prisoners (asking to know where they are or for news of them, for visits or an exchange to be arranged, or seeking a pardon or a release). An enquiry service was opened by the ICRC in Geneva and at the delegations to deal with these special requests.148

The message and enquiry service could not possibly have functioned without the support of the hundreds of volunteers which local branches of the Spanish Red Cross on either side of the front placed at the ICRC delegations’ disposal.

A total of 5,025,843 family messages were exchanged through the ICRC, while the enquiry service in Geneva opened some 30,000 files.149

Material assistance

Resolution XIV of the Tenth International Conference gave the ICRC the task of organizing international Red Cross relief in the event of a civil war.150 This made the ICRC, in a way, the mandatory channel for Red Cross assistance.

In practice, the National Societies abstained from intervening directly during the Spanish Civil War, immediately preferring to support the ICRC’s operations and leaving it responsible for using and distributing the assistance they made available. This attitude stemmed from a legitimate concern for impartiality and also from a wish to respect the official non-intervention policy which virtually all governments had adopted, at the instigation of Britain and France. The ICRC’s role was, then, that of the movement’s ‘handling agent’ for the supply of relief.151

The Committee’s main efforts went into supplying medical aid: surgical and X-ray equipment, laboratory supplies, medicines, beds, sheets, ambulances, and so on. Hospital directors and heads of medical services gave the delegates lists of needed equipment. After the most urgent items had been
identified, the lists were passed to various suppliers in order to obtain the best prices. The relief items were then sent to the delegations concerned, which saw to their distribution.\textsuperscript{152}

The severe food shortages in the Republican zone from the autumn of 1936 made the ICRC question the limits it had placed on its relief operation. Should it also provide food aid for civilians, even though this might compromise its neutrality? In any case, the Committee simply did not have the means to carry out a large-scale operation. Its response, therefore, was to plan carefully defined aid programmes, whose principal aim was to provide food to hospital patients, orphans and specific groups of children suffering from malnutrition. So as to maintain ‘a proper balance between the two zones’ the ICRC also supplied food to hospitals and dispensaries run by the Red Cross in the Nationalist zone.\textsuperscript{153}

The relief operation in Spain was the biggest undertaken by the Red Cross in the period between the two World Wars.\textsuperscript{154} The amount of medical assistance, in particular, was impressive. But the relief operation was hampered by financial problems which became steadily worse as the war continued. The world had not really emerged from the Great Depression which followed the 1929 financial crisis; as government and Red Cross funds were heavily committed to domestic aid programmes, especially for the millions of unemployed, little money was left for international relief. From the summer of 1937 this situation gradually forced the ICRC to scale down its relief distributions, but they were never completely stopped.

The ICRC scrupulously respected the principle of impartiality. In apportioning relief supplies, it tried as far as possible to maintain a balance between the two sectors of Spain. Contrary to the procedure followed during international conflicts, equality of numbers took precedence over the principle of proportionality, which requires that relief should be shared out according to need and the most urgent priority. Furthermore, in each zone the supplies were shared between the civilian population and prisoners. This rule of ‘dual sharing’, under which ICRC assistance ‘was shared first between the Republican zone and the Nationalist zone, then, within each zone, between Nationalist and Republican beneficiaries’, was a practical demonstration of impartiality.\textsuperscript{155}

This same concern for impartiality led the Committee only to accept gifts which it could distribute in accordance with Red Cross principles. Because of the passions aroused by the Spanish Civil War, the application of this rule had the effect of limiting the donations the Committee received, for many donors preferred to support organizations which assisted only one side or the other. Thus many relief organizations formed specially during the war, which had nothing to fear from openly taking sides, attracted greater backing than the Red Cross.\textsuperscript{156} But its respect for impartiality enabled the Committee – and it alone – to continue bringing assistance throughout the war to both sides of the front line and to people of both parties.\textsuperscript{157} Despite the strong partisan feelings aroused by the war, the ICRC’s impartiality was always
acknowledged by both sides; this was an important achievement, particularly with regard to the development of the law applicable to non-international armed conflicts.

Protection against bombing

Military aircraft had first been used in 1911 in Cyrenaica, during the war between Italy and Turkey. In the First World War aviation had played only a minor role. Since then, however, things had changed: in the arms race between the European powers, air power took on growing importance, and the Spanish Civil War provided the opportunity to test its potential.

In November 1936, the Nationalists’ Army of Africa was at the gates of Madrid; General Mola prepared to launch the decisive attack which would ensure victory. To make sure of seizing the city, he counted not only on his land forces but also on aerial bombardment which would spread panic among the population and break the Republicans’ will to resist. Night after night, German and Italian aircraft returned and dropped their lethal cargo of bombs on the besieged capital.\textsuperscript{158}

In fact, the attacks were not decisive, although their psychological impact was considerable. It was the first time that a great city had been bombed from the air – and it was felt that the sufferings of Madrid foreshadowed the fate of all major cities in the event of a new generalized conflict.

The Nationalists failed to take the capital, but the air war intensified.

On 26 April 1937, the bombers of the German Condor Legion attacked the Basque city of Guernica. In the space of a few minutes the city centre became an inferno; successive waves of aircraft continued the attack while the people fled in panic. It was a market day and there was considerable loss of life. Yet Guernica was not at the front line, and within the city there were no military objectives. There seemed to be no other purpose in its destruction than to spread terror among the Basque people on the eve of a Nationalist offensive and to gauge the effects of a devastating attack upon a defenceless population.\textsuperscript{159}

From the spring of 1938 onwards, both sides in the conflict – but especially the Nationalists, who had clear air supremacy – resorted to the bombing of towns to the rear as a means of smashing the resistance of their opponents and of trying to secure the victory which eluded them on the ground. Barcelona, in particular, suffered repeated attacks: skimming the hilltops, the planes arrived literally out of the blue, leaving no time for people to seek shelter, dropped their bombs and vanished as quickly as they had come.\textsuperscript{160}

Once again, the International Committee was faced with a new escalation of violence.

There were military means of dealing with the problem, such as anti-aircraft defences, interception and dissuasion; other possibilities were passive defence (such as providing shelter), which was unreliable because of the sud-
denness of the attacks, and a general prohibition on bomber aircraft, which was illusory because of the arms race. Apart from these, there were only two ways of protecting civilians against aerial warfare. The first was to create safety zones where all military activity would be prohibited and where the population would enjoy the kind of security guaranteed, in previous times, simply by distance from the front line. The second would be to evacuate the population of towns and cities deemed vulnerable to attack. In Spain, the ICRC tried the first of these approaches, and later the second.

In November 1936 the Committee contacted both parties in an attempt to arrange for an area of Madrid to be declared neutral, where military activity would be banned and as many non-combatants as possible grouped together.

The Nationalist government proposed the Salamanca district as a refuge for the non-combatant population. The Republican government, on the other hand, insisted that the entire civilian population of the capital should be considered as non-combatant and should therefore be spared; they argued that the proposal to group non-combatants in a specific area was unacceptable, since it implied that other parts of the city could be regarded as targets. But despite the Republicans’ rejection of the idea, Franco continued to respect the immunity of the Salamanca district, which was consequently left in relative peace during the siege of Madrid.

Nationalist aircraft continued to pound other quarters of the city. With the assent of the Republican government, the ICRC therefore began to evacuate women, children and old people who had been granted permission to leave Madrid but who did not have the means to do so. The Swiss government and the Swiss Red Cross supplied the ICRC with a dozen coaches and three trucks, which for two months drove back and forth between Madrid and Valencia, carrying a total of 2500 people to the coast. In Valencia the evacuees were put on board ships for Marseilles, and from there they travelled on overland to the Nationalist zone. This procedure was emulated by other governments, thus helping to speed up the evacuation of civilians from the capital.

So by attempting to create a safety zone and by helping to evacuate some of the civilian population from Madrid, the ICRC did achieve some success. But neither approach ensured sufficient protection for the civilian population as a whole. The idea of granting neutrality to one part of a city did in fact lend weight to the belief that other districts might be regarded as ‘free-fire zones’ forming legitimate targets. Nor could there be any question of evacuating the whole population of a city for any length of time. In both these scenarios, the protection of part of the population was carried out at the expense of the majority.

It was clear that the development of military aviation and its use against population centres raised a question of principle. By eliminating the traditional distinction between the front line and areas to the rear of it, bomber aircraft totally changed the relative positions of combatant and civilian.
Bombers could strike deep inside enemy territory – distance no longer gave any protection:

The bombing of open cities ... on both sides in the Spanish conflict has become more widespread and alarming than was the case even in the world war. Long-range, high-speed aircraft arrive unexpectedly over a city, release their bombs and disappear before the population is aware of the appalling danger. Most often, by the time the sirens go off the bombers are already flying away.163

The centuries-old distinction between combatants and non-combatants – which lay at the heart of humanitarian law – was being called into question. It was therefore not surprising that the ICRC, ‘conscious of its position as the voice of the Red Cross as a whole, and of all those who put their trust in the movement ...’164 decided to take a stand on this new method of waging war. On 15 February 1938 it addressed an appeal to the two belligerents, the text of which was communicated to every Red Cross Central Committee:

On many occasions, the various delegations of the International Red Cross Committee with the two parties to the struggle have drawn its attention to bombardments from the air and the terrible ravages they cause amongst so many innocent people, more particularly women and children ....

The International Red Cross Committee cannot, indeed, be unmindful of the fact that the protection of civilian populations constitutes for it a task of the greatest importance. Accordingly, availing itself of the fact that its Statute confers upon it the liberty to take any humanitarian initiative consonant with its traditional role, it feels it its duty to address a very urgent appeal to the parties to the struggle. It urges them to use all the means at their disposal to prevent – as it has always requested – any bombardment affecting the civilian population of localities in the rear and also any bombardment of localities that do not constitute strictly military objectives. The tragic consequences of aerial warfare would thus be lessened.

The International Red Cross Committee earnestly requests the parties to examine, as a matter of urgency, the possibility of entering for this purpose into a reciprocal undertaking. Being concerned, indeed, to relieve to the fullest possible extent the suffering inevitably occasioned by the hostilities, it is its duty further to put forth all its efforts with a view to removing some of the causes of that suffering.

In the conviction that, by thus doing, it is remaining within the limits of the strict impartiality by which its action is, in all circumstances, inspired, the International Red Cross Committee ventures to express the firm hope that the sentiments of humanity and generosity to which it appeals today will not have been invoked in vain.165

The Republican government remarked that, ‘by an involuntary irony’, the Committee’s appeal had coincided with three days of extremely severe air raids on Barcelona. While protesting against the phrase ‘the parties to the conflict’, which placed the victims of the bombing and those who were responsible for it on the same footing, the Valencia government gave a reminder of its earlier statements that it was refraining from bombing areas
behind the lines except in retaliation for raids by German and Italian aircraft; it declared its support for the ICRC’s appeal, whose humanitarian intentions it appreciated.166

Likewise surprised by this simultaneous request to both parties, although the Committee had not voiced any protest after the bombing of Burgos and Cantalejo, the Nationalist government rejected the appeal:

The National Government will continue to share, as far as it can, your humanitarian feelings and absolute respect for the civilian population, within the requirements imposed by war and which cannot be set aside for any consideration whatever, the more so since the character of the cities described as being behind the lines would appear to have been perverted.167

Several governments – in particular, the British – approached the belligerents at about this time, with the same purpose, but their requests went unheeded and the bombing of cities behind the lines continued until the end of the war.168

However, concern over the bombing of the civilian population was not confined to the Spanish Civil War. In view of the effects of aerial warfare in Spain and the Sino-Japanese conflict, military commanders were placing increasing emphasis on bomber aircraft in their strategic planning, recognizing their potential for destroying an enemy’s industrial centres and cities and undermining the morale of the population. In the event of a new generalized conflict, no city would be safe from air attacks.

It is not hard to appreciate, therefore, why the Sixteenth International Red Cross Conference, meeting in London in 1938, took up the subject and unanimously adopted the following resolution:

The fifty-four national Red Cross Societies assembled at the XVIth International Red Cross Conference ... appeal in the name of humanity to the competent authorities in all countries to prevent or so restrict bombing from the air as to safeguard the lives of helpless women and children and aged civilians, and urges these authorities, in all areas where civilian lives are liable to be endangered by any military operations, to arrange for the evacuation of women and children into zones of immunity under Red Cross protection.

The Red Cross Societies desire to place on record their earnest hope that effective steps will be taken without delay to secure agreements to this end between all governments in accordance with the spirit of chivalry and humane conduct for which the Red Cross stands.169

Although the resolution was adopted in plenary session, thus with the participation of states party to the Geneva Conventions, it was not voted in the name of the Conference, as would usually be the case, but in the name of the National Societies. Its wording to this effect was intended to stress the resolution’s particular solemnity as an appeal addressed by the Red Cross to all governments – or, more precisely, ‘to the competent authorities’, a term which could also describe governments whose legitimacy was contested.170
But the world was already teetering on the brink of war. Governments were not prepared to forgo new means of warfare which they believed would guarantee their security or ensure their supremacy, and which the more ambitious among them were eager to try out on the battlefields of Spain or the Far East.

In showing the extreme vulnerability of large cities to the destructive power of air warfare, the bombing of Madrid and Barcelona was a forewarning of the ordeal that lay ahead for many cities during the Second World War.

**Conclusions**

What conclusions can be drawn from the activities of the International Committee during the Spanish Civil War?

The first point is that its work covered a wide variety of fields, such as respect for the emblem, protection for medical units, assistance for prisoners, reciprocal releases of prisoners, family messages, protection for civilians and the provision of relief supplies. Almost all the activities carried out by the ICRC prior to 1936 were, to some extent, repeated in Spain. The Committee sought to apply to a civil war the operational framework that had proved successful during international conflicts.\(^{171}\) It made frequent reference to the Geneva and Hague Conventions, which it repeatedly said should be applied by analogy.

Some of the ICRC’s efforts failed, owing to the warring parties’ intransigence or lack of understanding. But others accomplished far more than might have been expected – for instance, in the protection of prisoners. In spite of the intensity of feeling aroused by the Civil War, the belligerents consistently acknowledged the impartiality of the ICRC and allowed it to work on either side of the front line to assist victims of both parties.

Nonetheless, the absence of a legal basis was a severe handicap to its work. The Geneva and Hague Conventions were not directly applicable to the war in Spain, and so the ICRC had no support in law for its work. Everything depended on the belligerents’ goodwill and on their receptiveness to the argument of mutual advantage.

With regard to the development of humanitarian law, two fundamental points stand out:

a) The Committee’s intervention demonstrated that humanitarian activities were indeed possible during a civil war: the special position of the ICRC and its impartiality were fully recognized.

b) The war highlighted the serious problems resulting from the absence of legal rules applicable to civil wars and showed how difficult it was, during actual hostilities, to reach agreements between belligerents to limit the violence and protect the victims: throughout the war no general agreement was reached, under the auspices of the ICRC or anyone else, despite continuous negotiations.
In the final analysis, the Spanish Civil War underscored the need to draw up, in peacetime, legal rules applicable to civil wars. The proposals made by the ICRC to the Sixteenth International Conference were to be a first step in that direction.

8. The Sixteenth International Conference of the Red Cross (London, 1938)\(^{172}\)

The Sixteenth International Conference of the Red Cross opened in London in June 1938 in an atmosphere heavy with foreboding. The Sino-Japanese conflict, the annexation of Austria and the Sudeten crisis seemed to have set the stage for new cataclysmic upheavals of which the Spanish Civil War was only the prelude. More than any other in the movement’s history, this conference was overshadowed by an awareness of imminent disaster and impelled by the fervent desire to achieve practical results.

Drawing on the experience it had acquired in Upper Silesia, Ireland and Spain, the International Committee presented a report on the role and activities of the Red Cross in time of civil war.\(^{173}\)

The document stressed the moral authority and practical value of Resolution XIV adopted by the Tenth International Conference, and did not question its validity; the ICRC’s proposals were intended to develop, not to revise the 1921 resolution.\(^{174}\)

The report pointed out, however, that the range of situations which had to be taken into consideration went far beyond armed conflicts. While acknowledging that there were many forms of civil war, it sought to group them in three categories and to define what role and possibilities of action the Red Cross might have in each:

a) disorder of secondary importance, sporadic unrest, strikes, acts of terrorism or riots, in which it was up to the National Society to give help if necessary; there would scarcely be occasion for the ICRC to take action;

b) serious disturbances which the government endeavours to suppress with the help of the police or military fighting against armed or organized forces, here, the intervention of the National Society would always be necessary; the International Committee may be led, irrespective of any outside demand, to suggest to the government that outside assistance be given to the victims of the clashes; such an offer would not constitute political interference or any form of recognition for the insurgents;

c) civil wars between two hostile political organizations, both exercising control over one part of the national territory and each having an army at its disposal; as the two parties would be separated by a fighting front, there must necessarily be two Red Cross bodies; the ICRC could offer its assistance spontaneously.\(^{175}\)
The document ended with a draft resolution which covered not only the possibilities and conditions for Red Cross intervention in internal conflicts, but also the principles governing the behaviour of combatants towards the conflict victims.\textsuperscript{176}

The draft resolution began by stressing ‘the right and duty of the Red Cross to assist all victims of civil war, or of social and revolutionary disturbances, of any kind whatsoever’, and confirmed the terms of the 1921 resolution.\textsuperscript{177}

It was then divided into four parts. Sections I, II and III dealt with the protection of the sick and wounded, prisoners of war and political prisoners, as well as non-combatants. Section IV laid down conditions for Red Cross action: the National Society must try to ensure respect for the principles relating to protected persons, and must enjoy entire liberty to afford impartial assistance to war victims; it could also ask for the assistance of foreign National Societies. Article IV, paragraph 3, dealt with intervention by the ICRC:

Independently of direct requests for assistance, the International Committee is empowered, when the National Red Cross is divided between both parties, or when foreign Societies are co-operating, to act as intermediary and thus facilitate the organization or co-ordination of the relief action.

Acting spontaneously and on its own authority, the International Committee may also offer its services and the collaboration of its appointed delegates, in order to ensure the best possible care of the sick and wounded, and assistance for prisoners of war and for families separated by the events of war.

Such steps shall only be taken with the consent of the interested parties.

The International Red Cross Committee may, as in time of international war, request the direct or indirect co-operation of foreign Red Cross Societies.

Such action, whatever the form it may take, shall in no case be considered as the recognition of a state of war or of belligerence, nor as help furnished to one or other of the hostile parties.\textsuperscript{178}

The draft was certainly one of the most comprehensive proposals yet made for a legal framework applicable to internal conflicts in which there was no recognition of belligerency; it outlined a veritable set of regulations for the protection of victims of internal strife. It also clarified the conditions which the ICRC, drawing on the lessons of the Spanish Civil War, judged necessary to guarantee the efficiency of its work in internal conflicts. Three points should be stressed:

a) the spontaneous nature of the ICRC’s offers of services;
b) the fact that an offer of services would be subject only to the consent of the party to which it was addressed; in other words, one side in a conflict could no longer object to the ICRC’s working on the other side;
c) the fact that the ICRC’s intervention would have no bearing on the qualification of the conflict or on the legal status of the parties involved.
Bassoli, The Battle of Solferino. Turin: Museo Nazionale del Risorgimento Italiano

Transporting the Wounded from Solferino to Castiglione. Charcoal by R. Pontremoli, Castiglione delle Stiviere: International Red Cross Museum
Henry Dunant at the time the Red Cross was founded. Reproduced by Boissonnas from an old photograph.
Franco-Prussian War of 1870: Lists of French wounded and German prisoners of war, compiled by the Basel Agency. ICRC Photo Library: HIST 395

The Balkan Wars, 1912: ICRC delegate Dr de Marval in conversation with a wounded man at Stara-Zagora hospital. ICRC Photo Library: HIST 277
First World War: Release of German and Austrian war disabled during the hostilities, carried out under the auspices of the Swedish Red Cross.
ICRC Photo Library: HIST 1144/4

First World War: ICRC delegate talking to German prisoners of war in Morocco, January 1916. ICRC Photo Library: HIST 617/14
First World War: War disabled being repatriated during the hostilities via Switzerland. ICRC Photo Library: HIST 323/21

First World War: Baths and disinfection in Kowel, Poland, in 1919, to combat epidemics. ICRC Photo Library: HIST 1716/9A
The Spanish Civil War, 1936–9: ICRC delegates speaking with a prisoner at Valencia prison. ICRC Photo Library: HIST 2221/17A

The Italo-Ethiopian War, 1935–6: The British Red Cross mobile hospital. S.D. Gatward, ICRC Photo Library: HIST 3086/16
Second World War: Oflag XVII A, Edelbach, partial view of the camp. ICRC Photo Library: HIST 1374

Second World War: The card index of the Central Agency for Prisoners of War in the hall of the Palais du Conseil général, Geneva. ICRC Photo Library: HIST 1816/2
Second World War: Central Agency for Prisoners of War, partial view of the French card index. ICRC Photo Library: HIST 3076/10

Second World War: Comparing enquiry and registration cards during tracing work in the French card index of the Central Agency for Prisoners of War. ICRC Photo Library: HIST 3012/26
Second World War: Oflag X B, Nienburg, ICRC delegates, accompanied by German officers, inspect the premises. ICRC Photo Library: HIST 1156/17

Second World War, Stalag XVIII A: ICRC delegate in conversation with the prisoners’ representative. ICRC Photo Library: HIST 1718/14A
Second World War, Canada, Camp No. 24: Mail being distributed. ICRC Photo Library: HIST 3073/28

Second World War, Slocan City, Canada, 1943, ICRC delegate in conversation with Japanese civilian internees. ICRC Photo Library: HIST 3073/29

Second World War, Canada, Camp No. 24: Mail being distributed. ICRC Photo Library: HIST 3073/28
Second World War: Geneva, partial view of ICRC warehouses in the Plainpalais district. ICRC Photo Library: HIST 3073/26

Second World War: The SS Rosa Smith being unloaded at Aberdeen, Scotland. ICRC Photo Library: HIST 2767/13A
Second World War: ICRC Relief Service for prisoners of war and civilian internees, spectacles section. ICRC Photo Library: HIST 2631/4

Second World War: Parcels being distributed in the presence of an ICRC delegate to French prisoners of war in a camp in Germany, August 1944. ICRC Photo Library: HIST 1180
Second World War: Göteborg, Sweden, October 1943, members of the British medical corps leaving the Rügen during an exchange of British and German war disabled and medical personnel. ICRC Photo Library: HIST 3073/19
Second World War: Smyrna, Turkey, exchange of English, French and Italian war disabled, taking place with the co-operation of the Turkish Red Crescent.
ICRC Photo Library: HIST 3073/18

Second World War: German-Swiss border, spring 1945, a convoy of ICRC trucks heading for Germany. ATP, ICRC Photo Library: HIST 3073/15
Uganda, 1984: Promoting knowledge of humanitarian law in schools, with the help of Uganda Red Cross Society volunteers. ICRC/L. de Toledo, ICRC Photo Library: OUGA 84-37/15A

United States, 1987: Law-of-war training for the armed forces. ICRC delegate taking part in American armed forces manoeuvres during which knowledge of the law of captivity is tested in practice. United States Marine Corps, ICRC Photo Library: HIST 3080/17
ICRC/François von Sury, ICRC Photo Library: SOMALIE 91-42/22
Civil war in Yemen: View of the ICRC hospital in Uqhd, 17 August 1964.
ICRC Photo Library: HIST 3076/22

Nigerian civil war (1967–70): A casualty just arrived at the Red Cross hospital at Ogikwi (Biafra). ICRC/M. Vaterlaus, ICRC Photo Library: BIAF 48/31
Civil war in Yemen, 1967: Casualties being treated at an ICRC first-aid post set up in a cave. ICRC/J. Santandrea, ICRC Photo Library: YEM 1967-36/6
Civil war in Yemen: Medical care at the ICRC hospital in Uqhd, 17 August 1964.
ICRC Photo Library: HIST 3076/26
Pakistan, 1986: Evacuating a wounded Afghan to a first-aid post run by the Pakistan Red Crescent Society and the ICRC. ICRC Photo Library: PAK 86-80/8

ICRC/Jean-Jacques Kurz, ICRC Photo Library: LIBA 76-9/68
Lebanon, 1982: A child being treated at an ICRC dispensary. ICRC/Luc Chessex, ICRC Photo Library: LIB 82-14/9A

Angola, Alto Hama, Huambo province, 3 August 1991: Measles vaccination campaign. ICRC/Didier Bregnard, ICRC Photo Library: ANGO 91-258/4

Cambodia, 1991: An ICRC doctor at Mongkol Borey hospital examining a child suffering from tuberculosis. ICRC/Serge Corrieras, ICRC Photo Library: CAMB 91-56/6
Angola 1980: The youngest patient at the ICRC prosthetic/orthotic centre in Bomba Alta, Huambo province. ICRC/Anne-Marie Grobet, ICRC Photo Library: ANGO 80-28/22A

Afghanistan: An Afghan employee finishing work on an artificial leg at the ICRC prosthetic/orthotic centre in Kabul, 17 October 1990.

ICRC Photo Library: AFGH 90-52/32
Pakistan: A 10-year-old Afghan boy trying out a temporary artificial leg just fitted at the ICRC prosthetic/orthotic centre in Peshawar, December 1981.
ICRC/Bedford, ICRC Photo Library: PAKI 81-7/14
Angola, 1980: Rehabilitation at the Bomba Alta prosthetic/orthotic centre, Huambo province. ICRC/Anne-Marie Grobet, ICRC Photo Library: ANGO 1980-28/19A

Yemen, 1971: Rehabilitation at the ICRC prosthetic/orthotic centre in Sanaa.
ICRC/Michel Convers, ICRC Photo Library: YEMEN 1971-44/64
Pakistan, 1983: Rehabilitation at the paraplegic centre in Peshawar.
ICRC/Thierry Gassmann, ICRC Photo Library: PAKI 83-17/31
Afghanistan: Rehabilitation at the ICRC surgical hospital in Kabul, 16 October 1988. ICRC/J.-P. Kolly, ICRC Photo Library: AFGH 88-14/1A
The tasks assigned to the ICRC stemmed implicitly from the references made to the Geneva Conventions of 1929 on the wounded and sick and on the treatment of prisoners of war.\(^{179}\)

The ICRC’s report was sent in advance to all National Societies.\(^{180}\) This prompted the Spanish Red Cross in Madrid to produce a document on the same subject.\(^{181}\) In it, the Spanish Red Cross unreservedly endorsed the Committee’s conclusions, and emphasized the need for close co-operation between the ICRC and the National Society of a country engaged in civil war. Speaking from its own experience, the Spanish Society illustrated the need for ICRC intervention with a simple and irrefutable argument: civil war would inevitably split a National Society into two groups which would be separated by the front but whose humanitarian aims would make it essential to find some common ground in order to alleviate the victims’ suffering; since the conflict would itself be an obstacle to direct co-operation, the intervention of a neutral intermediary would be essential – and this role had to be played by the ICRC.\(^{182}\)

The ICRC and Spanish Red Cross reports were passed on to the Conference’s Legal Commission, which discussed them at its fifth meeting. Three bodies of opinion emerged: some delegates, in particular those of the Red Cross in Nationalist Spain and of Portugal, felt that it was inopportune to discuss such a delicate subject at a time when feelings were running high, and called for it to be referred to a later International Conference; others, among them the representative of the Madrid Red Cross, insisted that the ICRC’s draft be adopted, or at least discussed; the third group, including the French Red Cross, urged the adoption of a resolution which, while acknowledging the importance of the ICRC’s intervention, would avoid laying down detailed rules to cover civil wars. The ICRC did not press the Commission to continue debating its draft but stressed the need to give the Committee a ‘moral basis’ for its work.\(^{183}\)

In the end a compromise was agreed. The Commission adopted the following text which was accepted without debate at the Conference plenary session:

The XVIth International Red Cross Conference,

having taken cognizance with keen interest of the report presented by the International Red Cross Committee on the role and activity of the Red Cross in time of civil war,

recalling the resolution relating to civil war adopted by the Xth Conference in 1921,

pays tribute to the work spontaneously undertaken by the International Red Cross Committee in hostilities of the nature of civil war and relies upon the Committee to continue its activity in this connection with the co-operation of the national Societies, with a view to ensuring on such occasions respect for the high principles which are at the basis of the Red Cross movement,

requests the International Committee and the National Red Cross Societies to endeavour to obtain:
a) the application of the humanitarian principles which were formulated by the Geneva Convention of 1929 and the Xth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores,
b) humane treatment for all political prisoners, their exchange and, so far as possible, their release,
c) respect of the life and liberty of non-combatants,
d) facilities for the transmission of news of a personal nature and for the re-union of families,
e) effective measures for the protection of children …
The Conference requests the International Committee, making use of its practical experience, to continue the general study of the problems raised by civil war as regards the Red Cross, and to submit the results of its study to the next International Red Cross Conference.\textsuperscript{184}

It was, in a sense, a show of recognition for the ICRC in that the Conference hailed the initiatives taken by it on behalf of victims of internal conflicts and encouraged it to continue in this vein, but it failed to provide what the ICRC had hoped for – a legal basis for its work.

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From the proceedings of the Sixteenth International Conference, it can be seen that two factors inhibited discussion of the substance of the ICRC’s draft and prevented its adoption:

a) the continuation of the Spanish Civil War, whose reverberations were felt at the Conference and which precluded a sufficiently calm and objective debate;
b) the fact that the ICRC declined to define the practical conditions that would determine the applicability of the proposed rules, and the difficulty in deciding the ‘hostility threshold’ beyond which the rules would come into force; this problem appears to have deterred several delegates who otherwise recognized the need to define more clearly the powers of the Red Cross in situations of internal conflict.

The Conference ultimately preferred to achieve unanimous approval for a watered-down text rather than risk a split over one whose scope was more sharply defined.

Its essentially moralizing nature meant that Resolution XIV was neither a restatement of the humanitarian rules applicable to civil war, nor the prop which the ICRC needed. In the final analysis, the Conference was encouraging the ICRC to continue down the same difficult and dangerous path, while withholding appropriate support.

The problem of the legal basis for Red Cross work for victims of internal conflicts remained unchanged.
9. Conclusions

The work of the Red Cross for victims of internal conflicts comes up against two main obstacles.

a) the uncertainty over the legal provisions applicable to internal conflict. Apart from certain basic humanitarian principles whose substance remains to be defined, neither the unwritten law of war, which developed during wars between nations, nor the humanitarian conventions, which apply only between the contracting parties, are directly applicable to internal conflicts.\textsuperscript{185} Only the classic procedure of recognizing a state of belligerency enabled violence to be limited through the implementation of most provisions of the law of war. However, this procedure was not used during the first half of the twentieth century, with the result that internal conflicts very largely escaped the control of international law;

b) the attitude of governments which, regardless of the repercussions that any internal upheaval inevitably has upon other countries, tend to view insurrection as a purely internal affair to be dealt with by national law. Any outside intervention, even if only to help the victims of the conflict, is likely to be seen as unwelcome interference or as an unfriendly act.

Despite these legal and political obstacles the Red Cross, true to the principle of humanity that is the cornerstone of its work, did all it could to assist the victims of internal strife. With the 1921 resolution, the Red Cross claimed for itself the right and the duty to help all victims of civil war, to whatever side they may belong.

The primary responsibility for providing help lay with the National Society of the country engaged in civil war. But that Society itself was in danger of being divided or paralysed by the conflict. Moreover, its resources would quickly be used up. So there had to be outside help. Since direct intervention by other National Societies might be seen as interference, it was deemed preferable to entrust the organization of international relief to a body whose traditional impartiality was beyond reproach: the ICRC.

Such was the system provided for by the 1921 resolution. But in fact the Committee went much further. Of its own accord, without waiting to be asked by the Spanish Red Cross, it sent a delegate to Spain, who took up contact with the Red Cross organizations and the political authorities of both sides. In Upper Silesia, and especially in Spain, the ICRC applied virtually the same operational framework that it had developed during international wars; it sought to carry out the whole range of activities stemming from the Geneva and Hague Conventions, and called for these Conventions to be applied by analogy.

The ICRC’s right to take any humanitarian initiative therefore stands out as the driving force in the development of Red Cross work in situations of internal conflict.
In some cases, the ICRC’s initiatives produced miracles. But the Committee also suffered undeniable failures: inhuman practices such as hostage-taking, torture and the massacre of prisoners continued despite the presence in the field of the Committee’s delegates and its approaches to those responsible. This illustrated only too well the difficulty of carrying out humanitarian activities which had no basis in law, and the consequent need to establish rules in peacetime which would apply to internal conflicts.

When the question was submitted to the Sixteenth Conference, discussion of it was deferred to a later meeting.

Yet the need to codify the law applicable to internal conflicts had to be addressed. This task was taken on by the Diplomatic Conference convened to revise the humanitarian conventions after the Second World War, which ultimately adopted Article 3 common to the four Geneva Conventions of 12 August 1949.

Notes

1 ‘The law of war, as a system of legal rules, originates in the customs established to regulate the relations, on the battlefield, between two bodies equal before the law’, Jean Siotis, Le Droit de la Guerre et les Conflits armés d’un Caractère non-international, Librairie générale de Droit et de Jurisprudence, Paris, 1958, p. 53.

2 Siotis, Le Droit de la Guerre, pp. 51–132; Charles Zorgbibe, La guerre civile, Presses universitaires de France, Paris, 1975, pp. 36–56. The discretionary power of the legal government was not unlimited: it could not claim for itself certain rights of a belligerent while denying the existence of a state of belligerency and opposing the exercise of the same rights by the insurgents. Thus, for example, the maritime powers refused to accept the validity of the blockade of certain parts of the Spanish coast, decreed by the Republican government on 9 and 11 August 1936, on the grounds that the said government had formally and repeatedly refused to recognize the existence of a state of belligerency, Siotis, Le Droit de la Guerre, pp. 160–1.

3 Zorgbibe, La guerre civile, pp. 71–97.

4 The notion of a specific legal regime applicable to internal conflicts should not be taken as implying the existence of a distinct set of rules which differ in content from those applicable to international conflicts, and which would apply only to internal conflicts. No such set of rules exists. The crucial question is how far the rules applicable to international wars should also be observed in internal conflicts. It is in this sense – and this sense alone – that the notion of specific legal rules for non-international conflicts should be understood.

The adoption of Article 3 common to the Geneva Conventions of 12 August 1949, and of Protocol II additional thereto, does not weaken this assertion. It can easily be shown that the intent of the Diplomatic Conferences of 1949 and 1974–7 was to effect a transposition: they were not seeking to create new rules, but to decide which of the existing rules relating to international armed conflicts could also be applied to internal conflicts. It is just as easy to show that all the substantive provisions of Article 3 and of Protocol II were taken over from the law applicable to international armed conflicts.

5 Bulletin international des Sociétés de secours aux militaires blessés, later the Bulletin international des Sociétés de la Croix-Rouge, no. 1, October 1869, to no. 179, July 1914, passim; Troisième Conférence internationale des Sociétés de la Croix-Rouge tenue à Genève du 1er au 6 septembre 1884, Compte rendu, pp. 237 and 239–41; Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Carlsruhe du 22 au 27 septembre 1887, Compte rendu, pp. 12, 38–9 and 147; Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu,

6 Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne, Imprimerie Fick, Geneva, 1863.

7 Bulletin international, no. 7–8, July 1871, pp. 208–14; no. 9, October 1871, pp. 24–6; no. 15, April 1873, pp. 152–4; Maxime du Camp, La Croix-Rouge de France, Société de Secours aux Blessés militaires de Terre et de Mer, Librairie Hachette, Paris, 1889, pp. 133–45.

8 Bulletin international, no. 12, July 1872, pp. 196–203; no. 13, October 1872, pp. 13–14; no. 17, October 1873, pp. 34–42; no. 18, January 1874, pp. 104–6; no. 19, April 1874, pp. 145–8 and 161–4; no. 21, January 1875, pp. 34–6; no. 23, July 1875, pp. 173–4 and 188; no. 25, January 1876, p. 16; no. 26, April 1876, pp. 88–9.

9 Bulletin international, no. 46, April 1881, pp. 74–80; no. 47, July 1881, pp. 142–4; no. 48, October 1881, pp. 233–7; no. 51, July 1882, pp. 158–64.


13 Bulletin international, no. 25, January 1876, pp. 1–4; no. 98, April 1894, pp. 78–9, etc.


15 The Committee restated its official policy in this respect after the First World War, see Revue internationale de la Croix-Rouge (RICR), no. 3, March 1919, p. 325.

16 29th Circular to Central Committees, 4 March 1874, Bulletin international, no. 19, April 1874, pp. 145–8; no. 20, July 1874, pp. 242–4.

17 108th Circular to Central Committees, 28 November 1903, Bulletin international, no. 136, October 1903, pp. 205–6; no. 137, January 1904, pp. 7–9; no. 138, April 1904, pp. 60–1.

18 The ICRC had said as much when commenting on the question of relief for the victims of the insurrection in Herzegovina in 1875–6: ‘There is here a question of principle which does not appear to be viewed in the same way by all concerned, and yet on which it would be important to adopt a common stance. It could very well be discussed at an International Conference…’, Bulletin international, no. 25, January 1876, p. 2.

19 The Central Committee of the Netherlands Red Cross had in fact submitted a memorandum on Red Cross work in civil wars to the Third, and then the Fourth International Conferences (Geneva 1884, Karlsruhe 1887); for reasons not stated in the records, the memorandum was never discussed – Troisième Conférence internationale des Sociétés de la Croix-Rouge tenue à Genève du 1er au 6 septembre 1884, Compte rendu, pp. 237 and 239–41; Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Carlsruhe du 22 au 27 septembre 1887, Compte rendu, pp. 12, 38–9 and 147.

20 Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu, pp. 40, 45–9, 60–1, 197 and 199–208; Moreillon, Le Comité international, pp. 34–9; Siotis, Le Droit de la Guerre, pp. 135–42.

21 Neuvième Conférence, Compte rendu, pp. 45–8. For the Cuban Red Cross, Dr Sanchez de Fuentes gave a statement on the conditions attached to the intervention of a National Society in a country affected by rebellion; in a sense his statement rounded off the American Society’s report, and was not discussed separately. Neuvième Conférence, Compte rendu, p. 49.

22 Ibid., pp. 45–8; see also the transcript of Mr Clark’s remarks, pp. 200–3.

23 Ibid., p. 47.

24 Ibid.
Ibid., p. 45.
Ibid., pp. 45 and 199–208.
statements by Dr Ion (Greek Red Cross) and Ms Favre (Swiss Red Cross), Neuvième Conference, Compte rendu, pp. 204 and 207.
Ibid., p. 208.


30 Seen in this context, the bombastic remarks made by General Yermolov at the Washington Conference seem less a show of strength than an admission of weakness by the representative of a regime whose days were numbered. Neuvième Conference internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu, p. 45.

31 Letter from Odier to the ICRC, 2/15 April 1918, ICRC Archives, file Mis.1.5.

32 Rapport général 1912–20, p. 187; Durand, From Sarajevo to Hiroshima, p. 100.

33 Frick’s mission report, 1 November 1918, pp. 2–3, ICRC Archives, file Mis.1.5.

34 Decree of 6 January 1918, translation, ICRC Archives, file Mis.1.5; Durand, From Sarajevo to Hiroshima, p. 99.

35 Bulletin international, no. 194, April 1918, p. 298; Durand, From Sarajevo to Hiroshima, p. 99.

36 Report by Frick to Odier, undated, attached to the letter of 2/15 April 1918 from Odier to the ICRC, ICRC Archives, file Mis.1.5.

37 Ibid.

38 Letter from the Council for the Administration of the Russian Red Cross to the ICRC representative at Petrograd, undated, ICRC Archives, file Mis.1.5; Durand, From Sarajevo to Hiroshima, p. 100.

39 Letter from Frick to the ICRC, 11 July 1918, ICRC Archives, file Mis.1.5; Durand, From Sarajevo to Hiroshima, p. 100.

40 Decree of 2 June 1918, signed by V. Ulianov (Lenin) and G. V. Chicherin, translation, ICRC Archives, files Mis.1.5 and CR 00/50c, Recognition of the Soviet Red Cross, and file P. des Gouttes (box no. 38). This decree was supplemented by an Order, dated 7 August 1918; ibid. and RICR, no. 34, October 1921, pp. 1038–40; Durand, From Sarajevo to Hiroshima, pp. 100–2.

41 Durand, From Sarajevo to Hiroshima, p. 103–4.

42 The representatives of the German and Austro-Hungarian Red Cross Societies, and those of the Ottoman Red Crescent, participated in ‘Conference’ discussions relating to prisoners of war.

43 Rapport général 1912–20, pp. 190–3; Frick’s mission report, 1 November 1918, ICRC Archives, file Mis.1.5; Minutes of the ‘International Conference’, ibid.; Durand, From Sarajevo to Hiroshima, pp. 102–5.


45 Report by W. Volkov, ‘Conference’ Secretary, to Frick, 29 December 1918, ICRC Archives, file Mis.1.

46 Report by Dr C. Martini and Dr J. Boss, 10 December 1918, ICRC Archives, file Mis.1 (Box 1).

47 At least, never as an ICRC delegate: it is not known whether Frick ever returned to the USSR in another capacity after leaving the ICRC.

48 For many months Allied prisoners of war in Germany and Austria had received basic necessities in the form of collective relief supplies sent from their own countries. Those who did not receive any assistance from their home country, in particular the Romanians, were described somewhat laconically by the ICRC as ‘dying like flies’.

49 Report to the ICRC on the operation to assist Russian prisoners of war, June 1919, ICRC Archives, file Mis.1; Minutes of the International Committee (Prisoners-of-War Agency), vol. 8, 11 and 23 December 1918, etc.
50 Before leaving Moscow, Frick had asked Paul Piaget and Eugène Nussbaum to ‘hold the fort’ during what should have been a temporary absence; since they had not been properly accredited and had no regular contact with Geneva, they could not validly represent the ICRC.

51 Letter from Eugène Nussbaum to the ICRC, 22 June 1920, ICRC Archives, file Mis.1.5.

52 178th Circular to Central Committees, 7 February 1919, RICR, no. 3, March 1919, pp. 327–8; letter from the ICRC to Dr Bagorzky, delegate of the Russian Red Cross in Berne, 30 July 1919, ICRC Archives, file CR 00/50 c. The ICRC finally recognized the Russian Red Cross in October 1921.


54 Minutes of the International Committee (Prisoners-of-War Agency), vol. 8, 1 July 1919.

55 Ibid., 8 September 1919.

56 Ibid., 9 January and 2 February 1920.

57 Letter from Dr Soloviev to the ICRC, 12 June 1920, ICRC Archives, file Mis.1.5. It is worth noting that in the autumn of 1919 the ICRC had to recall Frick from Poland at the request of the Polish authorities, who accused him of being a Bolshevik agent! Minutes of the International Committee (Prisoners-of-War Agency), vol. 8, 27 October, 3 and 10 November 1919.

58 Telegram from Dr Soloviev to the ICRC, 23 May 1920, ICRC Archives, file CR 00/50 c.

59 206th Circular to Central Committees, 15 October 1921, RICR, no. 34, October 1921, pp. 1035–40.

60 Rapport général 1921–23, pp. 60–5; Durand, From Sarajevo to Hiroshima, pp. 205–12.

61 Rapport général 1921–23, pp. 65–9; Durand, From Sarajevo to Hiroshima, pp. 212–16.

62 Note from Mlle Cramer, member of the ICRC’s governing body, to Édouard Frick, 17 February 1919, ICRC Archives, file Mis.1.


65 The question of Red Cross intervention in the event of civil war was put on the agenda by the ICRC (see the 1st, 3rd and 6th Circulars of the Executive Commission, Dixième Conférence internationale de la Croix-Rouge, Compte rendu, pp. 12, 14 and 17).

66 Dixième Conférence internationale de la Croix-Rouge, La Croix-Rouge et la guerre civile: Rapport présenté par la Croix-Rouge allemande (Document no. 31), Rapport présenté par la Croix-Rouge finlandaise (Document no. 78), Rapport présenté par la Croix-Rouge italienne (Document no. 19), Rapport présenté par la Croix-Rouge polonaise (Document no. 41), Rapport présenté par la Croix-Rouge portugaise (Document no. 11), Rapport présenté par la Croix-Rouge russe (Ancienne organisation) (Document no. 16), Rapport présenté par le Croissant-Rouge ottoman (Document no. 69), Rapport présenté par la Croix-Rouge ukrainienne (Document no. 68). The Russian Red Cross (in Moscow) had not been invited to take part in the Tenth Conference and its President, Dr Soloviev, had felt unable to accept an invitation to attend in a personal capacity; this meant that the Society – which had particularly wide experience of the problems attendant on Red Cross intervention in time of civil war – submitted no report and took no part in the discussions. For the background to this, see Moreillon, Le Comité international, pp. 53–4; Durand, From Sarajevo to Hiroshima, pp. 106–7. The title Russian Red Cross (Former Organization) referred to the Committee of the former Russian Red Cross which had been reconstituted...
abroad after the October Revolution. After the defeat of the White armies this Committee was principally concerned with helping Russian refugees who had fled to various countries.

68 Rapport présenté par la Croix-Rouge italienne, pp. 12–13; Rapport présenté par le Croissant-Rouge ottoman, p. 5; Rapport présenté par la Croix-Rouge russe (Ancienne organisation), p. 10.
69 Rapport présenté par le Croissant-Rouge ottoman, pp. 4–7; Rapport présenté par la Croix-Rouge russe (Ancienne organisation), p. 10.
70 Rapport présenté par la Croix-Rouge italienne, p. 11; Rapport présenté par la Croix-Rouge russe (Ancienne organisation), p. 7.
71 Rapport présenté par la Croix-Rouge italienne, pp. 12 and 17.
72 Ibid., pp. 18–23.
73 Rapport présenté par la Croix-Rouge allemande, p. 1; Rapport présenté par la Croix-Rouge italienne, pp. 16–17; Rapport présenté par la Croix-Rouge russe (Ancienne organisation), p. 5.
74 Rapport présenté par la Croix-Rouge allemande, p. 3; Rapport présenté par la Croix-Rouge italienne, pp. 16–17.
75 Rapport présenté par la Croix-Rouge italienne, pp. 10–11.
76 Rapport présenté par le Croissant-Rouge ottoman, pp. 3–7; Rapport présenté par la Croix-Rouge russe (Ancienne organisation), p. 11.
78 Rapport présenté par la Croix-Rouge allemande, p. 4; the idea was supported in the Rapport présenté par la Croix-Rouge russe (Ancienne organisation), pp. 7–8.
80 The discussions of this Commission are in: Dixième Conférence internationale de la Croix-Rouge, Procès-verbaux des séances de la Commission III (cyclostyled document at the ICRC Library, without reference number).
81 Dixième Conférence internationale de la Croix-Rouge, Compte rendu, p. 157.
82 Ibid.
83 Ibid., p. 158.
84 Ibid.
85 Ibid., p. 159.
87 RICR, no. 30, June 1921, pp. 648–50; no. 31, July 1921, pp. 691–720; no. 32, August 1921, pp. 861–2; no. 34, October 1921, p. 1052; no. 35, November 1921, pp. 1139–41; no. 43, July 1922, pp. 568–72; Rapport général 1921–23, pp. 15–21 and 50–1; Durand, From Sarajevo to Hiroshima, pp. 200–2; Siotis, Le Droit de la Guerre, pp. 148–9.
88 Dixième Conférence internationale de la Croix-Rouge, Compte rendu, pp. 217–18 (see above, pp. 260–2).
89 RICR, no. 31, July 1921, pp. 710–14; Rapport général 1921–23, p. 17.
90 RICR, no. 30, June 1921, pp. 648–9.
91 Quoted in Rapport général 1921–23, p. 17. See also Durand, From Sarajevo to Hiroshima, p. 201.
93 Note from Korianty to the ICRC delegation, 2 June 1921, published in RICR, no. 31, July 1921, p. 701.
94 Note from General Höfer to the ICRC delegation, 1 June 1921, published in RICR, no. 31, July 1921, p. 702.
95 Note from Count Moltke, Foreign Ministry representative with the German plenipotentiary for the plebiscite territory of Upper Silesia, to Lucien Cramer, 2 June 1921, published in RICR, no. 31, July 1921, pp. 702–3.
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97 RICR, no. 31, July 1921, pp. 694–6.
98 Note from the Inter-Allied Commission to the German plenipotentiary at Oppeln, 9 June 1921, RICR, no. 31, July 1921, p. 704.
99 RICR, no. 31, July 1921, pp. 703–4.
100 RICR, no. 31, July 1921, pp. 694–6.
101 Article 20.
102 Draft declaration of 24 June 1921, attached to a letter of the same date from the ICRC to its delegate at Oppeln, RICR, no. 31, July 1921, pp. 717–20. Article 20 of the Geneva Convention did not authorize the ICRC to issue or validate armbands for medical personnel; the draft declaration therefore took pains to point out that the ICRC had been ‘granted a general mandate by the Inter-Allied Commission … which includes the exclusive exercise of all Red Cross activities throughout the plebiscite territory’. This unprecedented activity was therefore not so much based on the ICRC’s universally recognized right of initiative as on a kind of delegated authority granted by the Commission.
103 Rapport général 1921–23, p. 20.
104 Ibid., p. 21.
105 Ibid., p. 21.
109 Siotis, Le Droit de la Guerre, p. 150; Thomas, The Spanish Civil War, passim.
110 Dixième Conférence internationale de la Croix-Rouge, Compte rendu, pp. 217–18; see above, pp. 260–2.
111 ICRC Archives, file CR 212.
112 329th Circular to Central Committees, 21 August 1936, RICR, no. 213, September 1936, pp. 749–53.
113 Ibid.; Durand, From Sarajevo to Hiroshima, pp. 318–22.
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statement by Dr Aurelio Romeo, President of the Spanish Red Cross, 1 September 1936, published in *RICR*, no. 213, September 1936, p. 757.

statement by José Giral, Prime Minister, 3 September 1936, published in *RICR*, no. 213, September 1936, p. 758.

statement by the Count of Valdellano, President of the Spanish Red Cross with the Junta de Defensa Nacional, and statement by General Cabanellas, President of the Junta, both on 15 September 1936, published in *RICR*, no. 213, September 1936, pp. 758–60.


For a more detailed and exhaustive account of the ICRC’s work in Spain, see Durand, *From Sarajevo to Hiroshima*, pp. 317–69.


*RICR*, no. 220, April 1937, p. 393.


*RICR*, no. 226, October 1937, p. 1005.


*Rapport complémentaire*, p. 16.


Ibid.


Resolution XIV, point 5, *Dixième Conférence internationale de la Croix-Rouge, Compte rendu*, pp. 217–18: see above, p. 262.


Ibid.


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157 RICR, no. 234, June 1938, p. 555.
159 Ibid., pp. 537–40.
164 Ibid., p. 130.
166 Durand, From Sarajevo to Hiroshima, p. 361.
167 Letter from General Espinosa de los Monteros, Under-Secretary of state for Foreign Affairs, 18 June 1938, ICRC Archives, file CR 212; Durand, From Sarajevo to Hiroshima, p. 363.
170 Durand, From Sarajevo to Hiroshima, pp. 387–8.
171 ‘The fact is that the Committee’s delegates should have virtually the same prerogatives in civil wars as Protecting Powers have in international wars,’ the ICRC concluded in its Rapport complémentaire (1938), p. 5.

Mention has already been made, in the preceding section, of Resolution IX of the Sixteenth International Conference. The resolution, dealing with the protection of the civilian population against air attacks, in fact applied to international wars as well as internal conflicts; it was prompted both by the events in Spain and by those in the Far East. The Sixteenth Conference also gave the opportunity for a general debate on the work of the Red Cross in civil wars. This will be discussed in the present section.
173 Sixteenth International Red Cross Conference, London, June 1938, The Role and Activities of the Red Cross in Time of Civil War (Document no. 10,a), ICRC, Geneva, 1938. No account is given here of the ICRC’s intervention during the troubles in the Irish Free State in 1922 and 1923, since they did not strictly speaking constitute an armed conflict, but rather a situation of internal disturbances. For a summary of the ICRC’s work there, see Moreillon, Le Comité international, pp. 72–6; Durand, From Sarajevo to Hiroshima, pp. 225–30.
174 The Role and Activities of the Red Cross in Time of Civil War, p. 12.
175 Ibid., pp. 10–12.
176 Ibid., pp. 12–14.
177 Ibid., p. 12.
This is not to deny that there are some customary rules of a fundamental nature which apply to internal armed conflicts just as much as to international wars, but the fact is that there is no general agreement over the content of these rules. For a discussion of this question, see Frits Kalshoven, ‘Applicability of customary international law in non-international armed conflicts’, Current Problems of International Law, edited by Antonio Cassese, Giuffre, Milan, 1975, pp. 267–85.

References

There is no comprehensive study covering the work of the International Committee of the Red Cross in situations of internal conflict. Among the many works that deal with the legal rules applicable to these conflicts, the following may be mentioned: Annuaire de l’Institut de Droit international, sessions in The Hague (1898) and Neuchâtel (1900); Erik Castren, Civil War, Suomalainen Tiedeakatemia, Helsinki, 1966; Antoine Rougier, Les Guerres civiles et le Droit des Gens, Librairie de la Société du Recueil général des Lois et Arrêts, L. Larose, Paris, 1903; Jean Siotis, Le Droit de la Guerre et les Conflits armés d’un Caractère non-international, Librairie générale de Droit et de Jurisprudence, Paris, 1958; Hans Wehberg, ‘La guerre civile et le droit international’, Collected Courses of the Hague Academy of International Law, vol. 63, 1938, no. I, pp. 1–127; Charles Zorgbibe, La guerre civile, Presses universitaires de France, Paris, 1975.
CONCLUSIONS

The end of the Second World War marked a turning point in the history of mankind.

The multilateral system of international relations, in place since the Congress of Vienna, gave way to a new order dominated by the rivalry of two superpowers – the United States and the Soviet Union – whose strategic arsenals guaranteed them unchallenged superiority over other states.

At the same time, because of the threat nuclear weapons posed to the future of the planet, those states that possessed them were in effect neutralized by each other’s strike capacity. It was a nuclear stand-off – a balance of terror.

Unable to fight each other openly, the great powers were forced to coexist, while waging proxy wars through states that relied upon their support. This led to a series of seemingly insoluble confrontations and conflicts: in the Middle East, Kashmir, Indochina, Korea and elsewhere, the wars that broke out after the end of the Second World War continue to smoulder even today and may flare again at any moment.

Meanwhile, the weakening of Western Europe, exhausted by two fratricidal wars, led to the collapse of its colonial empires and the birth of new nations trying to escape as best they could the domination and rivalry of the superpowers.

This second post-war period also marked the beginning of a new era for the International Committee of the Red Cross, in which it sought to assist the victims of new forms of conflicts generated by the after-effects of the Second World War or the decolonization process. Still unresolved, these conflicts continue to demand the ICRC’s intervention.

Moreover, the legal context of the ICRC’s activities had been radically transformed. The Second World War had shown the urgent need to revise and develop the rules of humanitarian law, drawing lessons for the future from the greatest bloodletting of all time. This legislative process culminated in the adoption of the four Geneva Conventions of 12 August 1949.

These Conventions are still in force. They have governed all the activities of the International Committee since their adoption and continue to serve as a basis for its work today.

For these reasons – the outbreak of new conflicts in which the ICRC is still involved, and the creation of a new legal framework – the essentially
chronological approach followed until now must be set aside so as to examine, in a more analytical manner, the position of the International Committee in contemporary humanitarian law.

This will be the aim of Book II.

* *

As the first part of this study draws to a close, it may be useful to review the historical development outlined in the preceding chapters.

The International Committee of the Red Cross was formed with the dual purpose of promoting both the creation of relief societies to help wounded soldiers and the adoption of a convention to improve the condition of the wounded and sick in armed forces in the field. As conflicts came and went, however, the ICRC found itself playing an increasingly active role in providing assistance and protection for all victims of war.

During this evolutionary process, three factors played a key part in the development of humanitarian law.

First of all, despite the setbacks and failings which have been recorded above, one is struck by the Committee’s unwavering commitment to helping the victims of war. In conflict after conflict the ICRC did its utmost to provide assistance, either through the National Societies concerned or – increasingly – by intervening itself in the theatre of hostilities.

Whereas many organizations gradually lose sight of their original purpose, the International Committee never allowed itself to be diverted from what it considered its raison d’être. It was never misled by the siren song of those pacifists who, claiming that its activities legitimize war by seeking to limit its effects, often beseeched it to follow their lead. Nor was it carried away by the surge of optimism of those National Societies which proclaimed after the First World War that the entire Red Cross should henceforth devote its energies exclusively to peacetime work. While National Societies invested a growing proportion of their time and resources in activities which, essentially, were concerned with public health and social welfare, the ICRC believed that it had to remain true to the mission for which the Red Cross had been created, namely, to provide protection and assistance to victims of war. When peace prevailed, it took the opportunity to improve the rules of international law protecting war victims, and continued its own preparations to face the burdens which any new conflict would impose upon it. And at all times the fundamental principles which guided its work – in particular those of humanity, impartiality and neutrality – remained unchanged. This constancy of purpose, maintained despite the cross-currents and head winds of four-score years, cannot be over-emphasized.

Secondly, it must be stressed that the practical ways in which the ICRC demonstrated its concern for the victims of war have continued to develop, in three directions:
a) The range of situations in which the ICRC felt itself qualified to intervene has constantly been extended. At the beginning, it intended to act only as a neutral intermediary between National Societies duly formed on the territory of states party to the Geneva Conventions; in practice, this restricted its scope of action to situations of declared war between recognized states. While the ICRC was certainly never indifferent to the plight of victims of internal conflicts and colonial wars (as evidenced by many articles and announcements in the *Bulletin international*), and although it often encouraged the National Societies directly concerned to assist the victims of those conflicts, it felt no compulsion to offer its services when the parties in conflict were not signatories to the Conventions and when there were not Red Cross Societies working on both sides.

These self-imposed restrictions were progressively dropped. From 1917 onwards the ICRC began intervening in situations of civil war and internal unrest, including the Russian Civil War, the revolution and counter-revolution in Hungary, the conflict in Upper Silesia and the war in Spain. It also sought to assist the victims of the war between Spain and the Rif tribesmen of Morocco, during which Madrid repeatedly rejected the ICRC’s offers of services although the number of victims was rising steadily. Despite the Spanish administration’s opposition the ICRC therefore finally decided to contact the Rif leader Abd el-Krim directly, but since the fighting ended just as its delegate arrived in Morocco, no relief operation ensued.\(^1\) Similarly, the ICRC intervened in China during the ‘incidents’ of 1931 and 1937, even though war had not been declared.

The International Committee thus progressively ceased to apply the formal concept of war as a criterion for its intervention and came to feel that it was justified in offering its services whenever an armed conflict gave rise to large numbers of victims.

b) A similar development took place with regard to the beneficiaries of the ICRC’s work. Initially confined to wounded and sick soldiers in land warfare, from 1868 it was extended to include wounded, sick and shipwrecked members of armed forces at sea. This remained the official policy of the ICRC until the early twentieth century, even though in practice it had begun assisting able-bodied prisoners during the Franco-Prussian War of 1870. In the Great War of 1914–18 the plight of prisoners of war became an overriding concern, then the Spanish Civil War and World War II prompted the ICRC to become involved in helping the civilian victims of war: political prisoners and the population hard hit by air raids or economic warfare.

So as the all-out nature of modern warfare became increasingly evident, the ICRC sought to protect all the victims of war, even though it did not always have the legal basis which would have provided crucial support and enabled it to work more efficiently.

c) Finally, the very nature of the ICRC’s interventions gradually changed. At the beginning, its members envisaged no more than a liaison activity in
line with Resolution 10 of the October 1863 Conference and Resolution IV/3 of the Berlin Conference of 1869, thus simply passing on to the National Society concerned any requests, information, messages or relief supplies received from the Red Cross Society on the enemy side or from Societies in neutral countries. In practice, however, the Committee soon overstepped this narrow limit, going wherever it could to be in direct contact with the victims of war themselves. Thus, the International Agency was not content merely to act as a largely passive relay, but endeavoured to trace the missing by making enquiries to national information bureaux, camp commandants, prisoners’ representatives and regimental comrades. Similarly, visits to prison camps were designed to establish a direct, personal contact between the ICRC and the prisoners it was called to protect. And in the field of assistance, the ICRC did not remain a simple ‘clearing house’ in accordance with the role originally assigned to it, but sought to deliver the relief supplies it received to the beneficiaries themselves and to monitor the distributions, so as to ensure some form of supervision without which large-scale relief operations would have been impossible.

The ICRC’s work thus gradually became an all-embracing commitment to providing direct and immediate assistance to all victims of armed conflicts, regardless of their status or the legal qualification of the conflicts.

Thirdly, in what is probably the most important contribution to the development of humanitarian law, there is the extraordinary accumulation of precedents created by the ICRC in its work to protect the victims of war.

In one way or another, the ICRC has carried out its humanitarian work in most conflicts that have occurred since its foundation. In both world wars its operations extended to almost every belligerent country, as well as to neutral states housing civilian or military internees. As the ICRC cannot impose its services, its operations have always taken place with the consent or at the request of the states concerned.

Can it be considered that the elements needed to constitute customary rules giving the ICRC specific powers for the protection of war victims are now all present? This question will be considered in Book II.

Suffice it to say here that one of the constituent elements of international customary law – uniformity of practice – does indeed appear to have been established, at least in three domains in which the ICRC, with the agreement of most members of the international community, has worked with particular consistency and regularity – the work of the Central Tracing Agency, visits to places of detention, and relief operations. By consenting to these activities, have not the states themselves implicitly acknowledged them as an established practice of the ICRC and recognized the ICRC’s right to carry them out?

Be that as it may, this process of consolidating established precedents merits some attention.
Most of the ICRC’s activities stem from an initiative taken by the Committee to address a specific problem that emerged during hostilities. Examples are the work carried out in aid of prisoners of war during the Franco-Prussian War of 1870 and the opening of the Civilian Section of the International Prisoners-of-War Agency in 1914.

These initiatives, taken in response to a given set of circumstances, lead to activities undertaken with the belligerents’ consent. The activities are then rationalized either as an extension of the ICRC’s official policy, which henceforth provides for the activity to be repeated in similar circumstances, or in the form of a resolution adopted by an International Conference of the Red Cross, should the ICRC feel it necessary to obtain authority from the movement as a whole for an activity which it first undertook on its own initiative. This resolution paves the way for that activity to be repeated systematically in future conflicts. Its consistent repetition, with the approval of the governments concerned, ultimately helps to establish a customary or treaty-based rule.

An attempt to illustrate and explain this alternation of cause and effect was made in the foregoing chapters: action taken on the ICRC’s initiative fosters the development of rules; they in turn allow the action to become systematic, while opening the way to further initiatives. Like the endless series of reflections in parallel mirrors, there is thus a continual interplay between the development of the ICRC’s practice and that of its official policy and humanitarian law.

Seen in this light, the importance of Articles 79 and 88 of the 1929 Convention on prisoners of war needs no emphasizing. They amounted, in effect, to recognition by the international community of the work achieved by the ICRC in the First World War, while providing the legal basis for the Committee’s activities to become systematic in future conflicts.

Equal importance must be given to three resolutions adopted by International Conferences of the Red Cross:

- Resolution IV/3 of the Berlin Conference (1869), concerning the establishment of a relief and information bureau;
- Resolution VI of the Washington Conference (1912), concerning assistance to prisoners of war;
- Resolution XIV of the Geneva Conference (1921) concerning the role of the Red Cross in civil war.

In these three resolutions, the National Societies and states represented at the Conferences acknowledged the authority of the International Committee in three essential aspects of its work, namely the activities of the Tracing Agency, assistance to prisoners of war and relief operations in time of civil war. They thus provided that key support needed for the development of the ICRC’s practice.

Nevertheless, in all three cases the ICRC went well beyond the mandates it had received.
From the start the Tracing Agency played a far more active role than might have been expected of a bureau set up to exchange correspondence and information. Similarly, the ICRC did not restrict itself during the First World War to assisting prisoners of war, but tried to initiate that form of supervision over conditions of detention without which the whole framework of legal protection would have been rapidly undermined by the belligerents’ use of reprisals. During the conflict in Upper Silesia and the Spanish Civil War the ICRC went far beyond its mandate to provide relief – as laid down by Resolution XIV of the Tenth International Conference – and sought to obtain respect for at least a minimum of humanitarian rules while working actively to ensure their application.

The ICRC’s right of humanitarian initiative thus remains the fundamental driving force behind the development of its practice and official policy; it is also one of the factors that has most directly contributed to the development of contemporary humanitarian law.

Note

BOOK TWO

THE INTERNATIONAL COMMITTEE OF THE RED CROSS IN CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW

The quality of mercy is not strained,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blessed:
It blesseth him that gives and him that takes.
‘Tis mightiest in the mightiest, it becomes
The thronèd monarch better than his crown:
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway,
It is enthronèd in the hearts of kings;
It is an attribute to God Himself,
And earthly power doth then show likèst God’s
When mercy seasons justice.
William Shakespeare,
The Merchant of Venice, Act IV, sc. 1.
'It is easier to do one’s duty than to know exactly what that duty is’ – so declared Baron Jomini, delegate for Russia, at the opening of the Brussels Conference in 1874.¹ There is no doubt that this observation applies to organizations just as much as to individuals.

However, to do one’s duty one must also have been taught how to do it, and be quite clear about one’s obligations and one’s rights. Hence the importance, for both practical and theoretical reasons, of defining the tasks and prerogatives of the International Committee of the Red Cross in the light of contemporary international humanitarian law. This is the aim of Book II.

Contemporary humanitarian law is not confined to the Geneva Conventions of 12 August 1949. They are, however, the quintessence of it and remain the cornerstone of the ICRC’s work of protection and the main basis for its activities. The Conventions are still in force today, as the Additional Protocols of 8 June 1977 were intended solely to supplement them on a number of important points, but not to revise or repeal them.

In considering the work carried out by the ICRC since the adoption of the 1949 Conventions, and even certain operations which preceded them, the focus will therefore be placed on a parallel analysis of the type of activity and the legal background for it. It is a fact that draft conventions on which the ICRC had been working since the end of the Second World War were frequently invoked by it long before they became law. Conversely, some field operations – conducted while such drafts were being prepared – themselves had a decisive influence on the development of humanitarian law. An example can be found in the safety zones set up by the ICRC in Jerusalem in May 1948.

This synchronic and analytical approach will now take over from the chronological narrative which brought us from the battle of Solferino to the end of World War II.

At the same time a different method of presentation is required, for even though the underlying homogeneity of the ICRC’s activities may have been perceived, some form of classification or grouping remains necessary, since we are unable to apprehend complex issues other than through their individual elements.

I have not hesitated to abandon the distinction between protection and assistance, which runs like a fault line through the Final Report on the
Reappraisal of the Role of the Red Cross and many subsequent works. Whatever the value of that distinction from an analytical point of view, it reveals a profound misunderstanding of humanitarian work. Is not caring for the wounded or feeding the starving the first step towards protecting them from suffering and death? In practice, protection and assistance are so closely interrelated that they are inseparable. In the final analysis, both terms amount to no more than two ways of describing one and the same thing, two interpretations of the same action. Trying to dissociate them, therefore, is pointless.

Another approach is suggested by the law itself, offering a distinction between international conflicts, to which the whole of humanitarian law is directly applicable, and non-international conflicts, which are governed by a more restricted body of rules. This was the approach I adopted initially, only to give it up later.

The truth is that, even though rules which were developed in international conflicts are not directly applicable to civil wars, they have nevertheless a definite exemplary value that should not be underestimated. The ICRC, which is a humanitarian organization and not a court of law, has constantly invoked the whole body of humanitarian rules and asked for their application by analogy, even in situations where they were not directly applicable.

Moreover, the object of this study is not the law as it applies to different types of conflicts, but the duties and powers assigned to the International Committee to protect the victims of war. The fact that different sets of rules apply to these conflicts does not necessarily imply that the ICRC’s activities will be different. Let us take, say, visits to places of detention. The legal basis for such visits varies fundamentally. In the case of international conflicts, the ICRC’s delegates have the right to visit all places where prisoners of war and civilian internees are held; in non-international conflicts, on the other hand, visits take place only at the discretion of the detaining authorities and on the basis of special agreements. When such agreements are reached, however, the visits themselves are carried out under the same operational procedures and principles as those applied during international conflicts.

It therefore appeared preferable to study the ICRC’s activities in situations of international armed conflicts together with those carried out in internal conflicts, pointing out the characteristics of the legal position in each case. While this approach may appear surprising at first, it does prove to be the most enlightening.

Since the sole concern of the International Committee is to protect human life, our approach to the subject must be determined by the situations in which the various groups of protected persons are placed. The 1949 Conventions suggest dividing those situations into four categories. However, in order to avoid repetition I have taken the liberty of grouping together the activities for prisoners of war and those for detained civilians.
We thus arrive at a slightly different four-way classification of the following groups of protected persons:

- wounded and sick military personnel in land warfare;
- wounded, sick and shipwrecked military personnel in war at sea;
- prisoners of war and detained civilians;
- the civilian population (detainees excepted).

That being said, certain problems concern all protected persons: those relating to the general rules which provide the ICRC with a legal basis for its work, and those with regard to its offers of services informing belligerents of its availability and willingness to help. These two issues, quite logically, will be discussed early in Book II.

Furthermore, it is necessary to compare the activities of the ICRC with those of the Protecting Powers mandated to look after the interests of the parties to conflict and of their nationals. Finally, the ICRC’s possible courses of action in the event, alas, of breaches of humanitarian law must also be examined with reference to all sets of rules and all categories of protected persons. These matters will be covered separately at the end of this work.

With these considerations in mind, the contents of Book II are structured as follows:

1. the sources of the law;
2. the ICRC’s offers of services;
3. the protection of wounded and sick military personnel in land warfare;
4. the protection of wounded, sick and shipwrecked military personnel in war at sea;
5. the protection of prisoners of war and detained civilians;
6. the protection of the civilian population;
7. the ICRC and the Protecting Powers;
8. the ICRC and the implementation of humanitarian law.

These subjects will be dealt with in the following Parts 1 to 8.

Notes

1 Actes de la Conférence de Bruxelles (1874), Imprimerie du Moniteur Belge, Brussels, 1874, p. 5.
PART ONE

THE SOURCES OF THE LEGAL REGIME APPLICABLE TO THE INTERNATIONAL COMMITTEE OF THE RED CROSS IN CONTEMPORARY HUMANITARIAN LAW

The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international.

INTRODUCTION

In order to solve any legal problem, the relevant body of law must first be identified. Which rules of law govern the activities of the International Committee of the Red Cross, and what are the effects of these rules on the parties to a conflict and on the ICRC itself? The duties and powers of the International Committee in current humanitarian law cannot be determined until these questions have been answered.

So the first question to be considered is that of the formal sources of the rules applicable to the ICRC. As humanitarian law is part of public international law, it can be assumed that its sources are to be found among the formal sources of public international law, consisting mainly of those listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. It is nevertheless of interest to try to identify those sources which are of direct relevance for the subject of this study, namely the work of the ICRC for the victims of war.

To do so, a distinction must be made between rules of a general nature which are valid for a variety of different situations, and specific rules which apply only to a given pre-existent situation. The determining factor is thus the chronological connection between the rule and the situation(s) to which it applies.

The general rules include first and foremost the humanitarian treaties currently in force – the Geneva Conventions of 12 August 1949 and their Additional Protocols.

The importance of treaty law should not, however, divert attention from the role played by universal custom. Indeed, it would be unthinkable to consider the ICRC’s practice – and that of states with regard to the ICRC – as having no bearing on the formation of international law. The extent to which the numerous precedents created throughout the ICRC’s history have helped to consolidate customary rules must therefore be determined.

Furthermore, the International Committee is a Red Cross institution. As such, it takes part in the deliberations of the International Conferences and the other statutory bodies of the International Red Cross and Red Crescent Movement, whose decisions also influence its work. This raises the question as to the decision-making power of the Conferences and the Movement’s other statutory bodies, and the extent to which their decisions are binding for the ICRC, the National Societies and the parties to a conflict.
Specific rules are of two kinds: they can be either special agreements framed to regulate a given pre-existent situation, or resolutions passed by a statutory body of the International Red Cross or by another international body in response to particular situations.

The aim of the following chapters is to assess the relevance of these various formal sources with regard to the rights and duties of the International Committee. Although the questions considered are essentially theoretical, they have practical consequences for the ICRC’s activities in aid of war victims.

However, two things should be borne in mind.

First, the sources referred to above are only those that directly concern the subject of this book; they do not comprise all relevant sources. Obviously, rules deriving from other sources of law might also be pertinent, such as the general principles of law, which govern the ICRC in the same way as they do any other subject of the international legal order. The International Committee is moreover affected by treaty provisions outside the humanitarian conventions, such as those of the Universal Postal Union Convention under which the Central Tracing Agency was granted exemption from postal charges. The ICRC may also be called upon in resolutions adopted by intergovernmental organizations, such as the United Nations, the ITU, and the like.

Secondly, there is nothing to prevent the same rule of international law from stemming from several distinct sources. One example is the rule pacta sunt servanda. Besides being a customary norm binding on all subjects of international law, it is confirmed by Article 26 of the Vienna Convention on the Law of Treaties of 13 May 1969; it also derives from the general principles of law, since no legal order will allow the unilateral abrogation of contracts.

Notes

1 By formal sources is meant the processes whereby the rules of law are created.
2 Article 38, paragraph 1 of the Statute of the International Court of Justice, states: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b) international custom, as evidence of a general practice accepted as law;
   c) the general principles of law recognized by civilized nations;
   d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’
CHAPTER I

INTERNATIONAL TREATIES OF A GENERAL NATURE

I-A. THE GENEVA CONVENTIONS OF 12 AUGUST 1949

Peace hath her victories
No less renown’d than war.
John Milton

1. Background and preparatory work

The Second World War had shown the need to expand the humanitarian conventions and thereby provide the civilian population with adequate protection at last.

The International Committee did not wait for the conflict to end before preparing to revise the 1929 Geneva Conventions and the 1907 Hague Convention No. X and draft a new convention to protect civilians in time of war. In a memorandum dated 15 February 1945, the ICRC announced that it was starting consultations for that purpose and asked for the support of governments and National Societies in gathering the necessary documentation.1

In October 1945, the ICRC convened a meeting of experts drawn from the neutral members of the Mixed Medical Commissions which had been responsible during the war for examining sick and wounded prisoners of war and determining their eligibility for repatriation.

The ICRC submitted its proposals and first drafts to a conference of National Red Cross Societies which met in Geneva in July and August 1946 to examine the conventions and other questions relating to the Movement. The conference was attended by 145 delegates from forty-five National Societies, as well as representatives of the ICRC and the League of Red Cross Societies.2

The Committee then consulted the Conference of Government Experts convened in Geneva in April 1947 to study the conventions protecting war victims. This meeting brought together seventy experts appointed by the governments of fifteen countries which had particularly wide experience in the matter.3

On the basis of the conclusions reached by the two preparatory conferences and of other consultations, the ICRC formulated four draft conventions relating to the wounded and sick in armies in the field (revision of the relevant Geneva Convention of 27 July 1929); the wounded, sick and
shipwrecked in armed forces at sea (revision of Hague Convention No. X of 18 October 1907); prisoners of war (revision of the relevant Geneva Convention of 27 July 1929); and the protection of civilians in time of war.4

These draft conventions were submitted to the Seventeenth International Red Cross Conference, meeting in Stockholm from 20 to 30 August 1948; they were referred to the Legal Commission, which examined them article by article and approved them with only minor amendments.5 The Stockholm Conference also recommended ‘that all governments meet at the earliest possible moment in Diplomatic Conference for the adoption and signature of the texts now approved.’6

The draft conventions produced in Stockholm were sent to the governments of all countries invited to take part in a diplomatic conference to be held the following year.7 The ICRC also sent the governments concerned a document entitled Remarks and Proposals submitted by the International Committee of the Red Cross, containing a number of considerations resulting from its most recent research on the subject.8

Convened by the Swiss government, the Diplomatic Conference opened in Geneva on 21 April 1949, in the presence of 277 delegates representing fifty-nine governments. Experts from the ICRC and the League were allowed to take part, while representatives of the United Nations and of various specialized organizations were invited as observers.

The work of the Conference was carried out by four main committees:

- Committee I was responsible for examining the draft conventions concerning the wounded and sick in armed forces in the field and the wounded, sick and shipwrecked in armed forces at sea;
- Committee II studied the draft convention concerning prisoners of war;
- Committee III examined the draft convention for the protection of civilians in wartime;
- the Joint Committee examined the articles common to all four draft conventions.

These main committees appointed sub-committees or working parties as and when they felt it necessary to do so. The drafts finalized by the main committees were then examined and adopted by the Plenary Assembly of the Conference.9

The Conference ended with the adoption of four Conventions, revised or new, for the protection of war victims:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Geneva Convention relative to the Treatment of Prisoners of War;
- Geneva Convention relative to the Protection of Civilian Persons in Time of War.

All four Conventions bear the date of 12 August 1949.10
2. The binding force of the Geneva Conventions

By 31 December 2001, 189 states had become party to the Geneva Conventions of 12 August 1949 – virtually every nation in the world. Only a few recently independent states have not yet done so.

The Geneva Conventions have therefore attained a degree of universality comparable to that of the United Nations Charter or the founding charters of some of its specialized agencies, such as ILO, UNESCO, WHO and FAO. They are one of the rare sets of rules which have received the unanimous support of the international community.

The 1949 Diplomatic Conference took every possible precaution to guarantee the binding force of the new Conventions. As in 1929, the general participation clause (clausula si omnes) was intentionally omitted; moreover, allowance was made for the Conventions to apply also to a state that was not party to them, on condition that it declared its readiness to accept their provisions and did in fact apply them. Article 2 common to the four Conventions stipulates that:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Common Article 62/61/141/157 also specifies that when a state engaged in international or internal conflict notifies its accession to the Conventions at the start of or during hostilities, that notification will take immediate effect.

Another common article (63/62/142/158) states that denunciation of the Conventions will take effect one year after notification has been made to the Swiss government, the depositary thereof, but not if the denouncing Power is involved in a conflict. In that case the denunciation would not take effect until peace has been concluded, and then only after the release and repatriation of all protected persons. The denunciation would affect only the party concerned, and would not alter relations between other states.

However, given the universality of the Conventions and their international moral standing, it is hard to imagine that any country, once party to them, would denounce them.

On the other hand, it is conceivable that instead of denouncing the Conventions – which would have repercussions vis-à-vis all contracting parties – a country at war might decide to suspend their application in regard to its adversary, on the ground that the latter had blatantly violated their basic provisions.

In such a case the moot point would be the effects of an absence of reciprocity.

This question deserves examination. It is in fact generally accepted in international law that a state that is directly harmed by a material breach of a
multilateral treaty has the right, in certain circumstances, to suspend application of all or part of that treaty in its relations with the defaulting party.\textsuperscript{13} This rule is confirmed by the Vienna Convention on the Law of Treaties of 23 May 1969, Article 60 of which allows a contracting party that has been specially affected by a material breach of a multilateral treaty ‘to invoke it as a ground for suspending the operation of the treaty in whole or in part’ in the relations between itself and the defaulting state.\textsuperscript{14} It is a form of reprisals which a state affected by a breach takes to penalize the state responsible.\textsuperscript{15}

As regards the law of war, however, experience has repeatedly shown that the taking of reprisals inevitably leads to abuse, each side using alleged breaches by its adversary as an excuse to rid itself of obligations restricting its freedom of action. Furthermore, all reprisals lead to counter-reprisals, with the result that the opposing sides become locked in a process of measures and counter-measures which rapidly erode all semblance of legality and open the way to unrestrained violence.

In the specific field of humanitarian law, moreover, any exercise of the right of reprisal runs counter to the aims of the relevant conventions, since punitive measures against a state accused of non-compliance inevitably harm the very people the law is supposed to protect.

Lastly, any reprisals whatsoever against persons protected by the Geneva Conventions are iniquitous and contravene the general principles of law, as their effect is to penalize people who are themselves the victims of war – the wounded and sick, the shipwrecked, prisoners of war, civilian internees and the population of occupied territories – for acts which they have not committed.

By virtue of Articles 46, 47, 13 and 33 of the 1949 Conventions, the contracting parties have therefore expressly renounced the right to take reprisals and have prohibited any form of reprisals against people protected by the Conventions.

As a result, a contracting party is not allowed to suspend the application of the Geneva Conventions, in whole or in part, with regard to an adversary who may have violated their provisions.\textsuperscript{16}

The Vienna Convention on the Law of Treaties takes account of the specific requirements of the humanitarian law treaties: Article 60, paragraph 5, specifies that the rules allowing a state to suspend the operation of a treaty in whole or in part, because of an alleged violation by another contracting party, do not apply ‘to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.’

The binding force of the 1949 Geneva Conventions stems primarily from the fact that the contracting parties undertake to respect the Conventions in all circumstances. Article 1 of each Convention states: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention
in all circumstances.’ In more general terms, the binding force of the Geneva Conventions originates in the principle of *pacta sunt servanda*, according to which any treaty in force binds the contracting parties and must be executed in good faith.

Except for the particular conditions arising from their universality, from the suspension of the principle of reciprocity and from the banning of reprisals, the rules governing the interpretation and application of the Geneva Conventions are those prescribed by the law of treaties.

3. The effects of the Geneva Conventions with regard to the ICRC

The question now to be considered is whether the Geneva Conventions do, in effect, confer rights and obligations on the International Committee of the Red Cross.

Generally speaking, a treaty creates neither rights nor obligations for entities which are not party to them, in accordance with the maxim *pacta tertiis nec nocent nec prosunt*. This general rule stems from the contractual nature of international treaties as well as from the principle of the equality of states.\(^\text{17}\)

The Geneva Conventions are treaties between states, and states alone may become party to them. The International Committee is not one of the contracting parties. It would be wrong, however, to conclude that the Geneva Conventions do not create rights and obligations for the ICRC and that they are for it simply a *res inter alios acta*. Both common sense and international practice reject any such conclusion.

The point is that there are numerous exceptions to the maxim *pacta tertiis nec nocent nec prosunt*. The most important of these – and perhaps that to which least consideration has been given – concerns the relation between the founding charter of an international organization and the organization itself. While there can be no doubt that its founding charter gives rights and obligations to an international organization, it is also clear that the organization cannot be party to it, since its very existence is a consequence of the adoption of that charter. The aforesaid maxim therefore cannot be taken to rule out the possibility that the Conventions might well confer rights and obligations on the ICRC.

Everything hinges on the intention of the contracting parties. Indeed, there is nothing to prevent sovereign states, if they so wish, from assigning rights and obligations to a legal entity within the international order or, for that matter, to a legal entity or individual that is subject to a state’s internal legal order.\(^\text{18}\)

Each case must be considered on its own merits in order to determine the intention of the parties involved; the question is one of interpretation, subject to the usual rules governing the interpretation of treaties. So the first step...
should be to look at the text of the treaty to find out the intention of the contracting parties and, if in doubt, to study the preparatory work for it or the subsequent practice.

In Article 126 of the Third Geneva Convention, the intention is clear:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment or labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners’ representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure .... 19

The phrasing of the article, the use of the indicative mood, the precision of the terms employed and the mass of detail leave no doubt that the Diplomatic Conference intended to impose definite obligations on the detaining power – obligations which, for the Protecting Power, become rights of which it may claim the benefit.

The final paragraph of Article 126 goes further by bringing the position of the ICRC’s delegates into line with that of the Protecting Powers’ representatives. It states:

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.20

So if it is clear that Article 126 of the Third Geneva Convention confers rights on the Protecting Power, it must also be evident that the International Committee enjoys identical rights.

Any possible doubt in this respect is dispelled by the record of the preparatory work. With regard to the said Article 126 (draft Article 116), the report by Committee II to the Plenary Assembly of the Diplomatic Conference makes the following comment: this article,

which amplifies similar provisions of the 1929 Convention, defines the right of representatives of the Protecting Powers and of the International Committee of the Red Cross to exercise their supervision direct, by visiting all places of detention where prisoners of war may be, and to interview them.21

So the Geneva Conventions indisputably do grant rights to the International Committee which it is fully entitled to invoke.

But can the same be said for any obligations which might stem from the Conventions? Not necessarily. For a treaty to impose obligations on a third party, it is not sufficient that this be the intention of the contracting parties – the third party must give its consent, and that consent cannot be taken for granted.22
It must therefore be determined in each case whether the International Committee has consented to any of the obligations imposed on it by the Geneva Conventions.

The last paragraph of Article 126 of the Third Convention is a good example. As a corollary to granting the ICRC the right for its delegates to visit POW camps, the Convention obliges the ICRC to submit the names of its delegates to the detaining power for approval. The ICRC's consent to this obligation is shown by the fact that it proposed the measure itself.  

The question of the binding force of the Geneva Conventions with regard to the International Committee was brought into sharp focus during the Nigerian civil war.  

In the event of a blockade, Article 23 of the Fourth Geneva Convention obliges the blockading power to allow the free passage of certain relief supplies for the civilian population. However, it also grants that same power extensive rights to check on the relief consignments; these rights are tantamount to obligations binding on the organizations bringing in the relief.

While stressing that the right to monitor such supplies should not be used to block the relief operation, and while trying by every legitimate means to preserve its freedom of action, the ICRC always considered that it was bound by the provisions of Article 23 and that it was therefore obliged to submit to any requirements which the Nigerian federal government might impose in good faith, on the basis of that article.  

The ICRC was virulently attacked for taking this stance, especially as other organizations, undeterred by the same scruples, appeared to circumvent without any difficulty the obstacles it encountered. But the ICRC's attitude was justified: it could hardly ignore a set of rules which it had itself helped to create and for which it demanded respect by all governments.  

To sum up, although the International Committee is not a party to the Geneva Conventions, it is evident that the Conventions do give it rights, of which it may claim the benefit, and impose obligations upon it, in so far as it has agreed to them.

Moreover, the ICRC's role in the preparatory work, the fact that the Diplomatic Conference used its drafts as a basis for discussion, the participation of its experts in the negotiations and the fact that the conference consulted it on provisions directly concerning it, all suffice to show that for the ICRC the Geneva Conventions are not, and never can be, *a res inter alios acta*.

### I-B. THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS

#### 1. Background and preparatory work

At the end of its deliberations, the 1949 Diplomatic Conference expressed the earnest hope that 'in the future, Governments may never have to apply the
Geneva Conventions for the Protection of War Victims ...' and that 'peace shall reign on earth for ever'.

Alas, even as this resolution was adopted it was clearly no more than a pious hope. Rivalry between the two power blocs, the dismembering of the colonial empires and the political instability of a growing number of states had sparked off a host of conflicts, most of which had no end in sight.

Throughout these conflicts, the application of humanitarian law suffered mixed fortunes. While the Geneva Conventions did offer effective protection for the victims of war when they were applied in good faith, the fact remains that they were often flagrantly violated.

What is more, these modern conflicts were generally very different in form from those in which the laws and customs of war had developed over the centuries: wars of national liberation; internal conflicts which were in reality proxy wars between the superpowers, fuelled by their overt or covert intervention; armed subversion or revolutionary wars; or straightforward conflicts between two or more factions within divided nations.

It is hardly surprising, therefore, that there was a growing call for humanitarian law to be updated. Three entirely different factors appear to have influenced this demand.

In the first place, the discrepancy between the ‘Law of Geneva’, entirely reshaped in 1949, and the ‘Law of The Hague’, which had last been revised in 1907, was too great to be overlooked. The disparities were most striking in the provisions relating to the conduct of hostilities, the methods and means of combat and the protection of civilians against attack; these appeared positively archaic at a time of acute alarm at the threat posed by the nuclear bomb for the future of mankind.

Secondly, it was felt – rightly or wrongly – that the 1949 Conventions, drawn up just after the Second World War and implicitly based on the experiences of that conflict, were ill-adapted to the new forms of struggle which had appeared since their adoption, especially to wars of national liberation and guerrilla warfare.

And lastly, there was resentment among Third World nations, most of which had acceded to independence after 1949, at being bound by legal instruments in whose formulation they had not participated. These countries wanted humanitarian law to be revised in a way that better suited their concerns. This, again, was hardly surprising, since most of the post-1949 conflicts were taking place in the developing world.

These concerns were voiced within the Red Cross movement and, more imperatively, within the United Nations system. The ICRC, however, saw little possibility of the international community overcoming its deep divisions and reaching the broad consensus that would be essential to write a new chapter in humanitarian law. But neither did it feel able to back away from the task it was requested to assume, and relinquish to other organizations a role that it had played for more than a century...
in the codification and development of humanitarian law. So its legal draughtsmen went back to the drawing board.

Did this mean that the 1949 Conventions had to be dismembered? The most elementary caution counselled against it. The only acceptable solution was to supplement and develop the Geneva Conventions by means of additional protocols.

After amassing a wealth of documentation, the ICRC invited government experts to a conference on the development of humanitarian law applicable in armed conflicts; this meeting, held from 24 May to 12 June 1971, was attended by 190 experts sent by forty-one governments; a second meeting was held in Geneva from 3 May to 3 June 1972, attended by more than 400 experts representing seventy-seven governments.

The Red Cross was also consulted: in March 1971 at The Hague, and in March 1972 at Vienna, the International Committee convened two conferences of experts nominated by the National Red Cross Societies. In November 1971 the ICRC also asked the opinion of a meeting of non-governmental organizations.

On the basis of these consultations, the International Committee drafted two protocols additional to the Geneva Conventions: the first dealt with the protection of victims of international armed conflicts, the second with the protection of victims of non-international conflicts. These drafts were submitted to the Twenty-second International Conference of the Red Cross which met in Teheran from 8 to 15 November 1973; they were approved without modification, and the Conference recommended that they be used as the basis for discussion at the forthcoming Diplomatic Conference convened by the Swiss government.

The Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts met in Geneva in four sessions (20 February to 29 March 1974, 3 February to 18 April 1975, 21 April to 11 June 1976 and 17 March to 10 June 1977). The conference was attended by representatives of 124 states and a number of national liberation movements; the ICRC was invited to take part as an expert.

The Conference established three main committees to study the draft protocols. It also set up a plenary Ad Hoc Committee responsible for the examination of the questions of prohibition or restriction of the use of certain categories of conventional weapons which may be deemed to cause unnecessary suffering or to have indiscriminate effects. Where needed, the main committees created sub-committees or working groups.

The Conference ended its work on 10 June 1977 after adopting two Additional Protocols:

a) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);
b) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).37

2. The binding force of the Additional Protocols

The Protocols additional to the Geneva Conventions came into force on 7 December 1978.38 By 31 December 2001, 159 states were party to Protocol I and 151 to Protocol II.39

In order to guarantee the binding force of Protocol I, the Diplomatic Conference instituted safeguards similar to those adopted by the 1949 Conference in respect of the Geneva Conventions. For instance, even if one of the parties to a conflict is not party to Protocol I, those that are remain bound by it in their mutual relations; they are also bound by the Protocol in relation to a party not bound by it, if the latter accepts and applies its provisions.40 Denunciation of Protocol I is subject to the same conditions as for the Conventions themselves: when notified during hostilities, it cannot take effect before the end of the conflict or occupation and the release and final repatriation of protected persons.41

On the other hand, there are new provisions concerning the effects of becoming party to the Protocol at the start of or during hostilities. To understand them clearly, it is necessary to have another look at the conditions of application of the Geneva Conventions and Protocol I, and to take a major step back into the past.

The application of the 1949 Conventions is determined by Article 2 common to all four Conventions, which states that they apply to

all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them [as well as to] all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The application of the Conventions is, therefore, subject to a material condition (the existence of an armed conflict or occupation) and a formal condition: the involvement of two High Contracting Parties, in other words, two states.

Unless the level of hostilities became such that other provisions of humanitarian law might be invoked – by virtue of customary law, a recognition of belligerency or an agreement between the belligerents – internal conflicts were covered only by Article 3 common to the four Conventions. Its provisions offered but minimal protection to the victims of these conflicts.

Within these parameters, wars of national liberation waged by indigenous peoples against the respective colonial powers were considered internal conflicts, as they took place on the territory of just one High Contracting Party. Thus, Article 3 alone was applicable. Furthermore, the device of recog-
nition of belligerent status – which would have led to the application of most provisions of the law of war – was never, as far as is known, applied to colonial wars, although the circumstances and especially the scale of military operations would have fully justified such an application in conflicts of the kind which took place in Algeria or Indochina.

This situation could hardly be expected to satisfy the countries of the Third World. On the basis of the principle gradually accepted within the United Nations that under international law, colonial peoples enjoyed a status separate and distinct from that of the colonial power, these countries demanded that wars of national liberation be equated with international armed conflicts and not viewed merely as internal struggles.

This demand was forcefully expressed from the outset of the Diplomatic Conference in 1974. After a lengthy debate – and a vote which the conflicting opinions on that question made inevitable – the Conference adopted the following provisions:

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law governing Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.

This is a vitally important provision, which affects the whole substance of Protocol I and which enlarges the scope and the conditions governing the application of the Geneva Conventions for those states which are party to the Protocol.

To enable the provision to become effective, national liberation movements had to be given the opportunity of acceding to Protocol I. This was achieved through the provisions concerning the effects of an accession notified at the start of or during hostilities, for under Article 96, paragraph 3, an accession notified by a liberation movement engaged in an armed conflict takes immediate effect with regard to that conflict:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

For the accession of a liberation movement to have the above-mentioned effects, does the state in question itself have to be party to Protocol I? There can be little doubt that it does – the procedure laid down by the Protocol could hardly be binding on a state which is not party to it. Furthermore, the phrase ‘engaged against a High Contracting Party in an armed conflict’ is sufficiently clear to dispel any doubt. In Protocol I, the term ‘High Contracting Party’, unless qualified, can only mean a party to the Protocol, and not to any other treaty.

It is therefore hard to understand why the Diplomatic Conference made no allowance for a state which notified its accession at the start of or during hostilities to become party to Protocol I with immediate effect. The unfortunate result could be that a state which deposits its instrument of ratification while involved in a conflict would have to wait six months before becoming party to the Protocol.45

It has been shown how seriously the practice of reprisals undermines the binding force of humanitarian rules. The Diplomatic Conference therefore extended the prohibition of reprisals to cover all persons protected by the Conventions and Protocol I; it now includes reprisals against wounded, sick and shipwrecked members of the armed forces and civilians, military or civilian medical or religious personnel, military or civilian medical units, premises and transport, mortal remains and missing persons.46 Also forbidden are attacks by way of reprisals against the civilian population and individual civilians, against civilian objects, cultural objects and objects indispensable to the survival of the population, against the environment and against works and installations containing dangerous forces, such as dams, dykes and nuclear power plants used to generate electricity.47

The parallel existence of the 1949 Conventions and Protocol I raises the issue of the relationship between two successive treaties or groups of treaties which cover the same situations, but of which the second is less widely adopted than the first.

Since only those states that are party to the Conventions may also subscribe to Protocol I,48 three situations might arise:

a) In cases where all the belligerents are party to Protocol I, the Conventions will apply ‘as supplemented by this Protocol’; the same applies where a liberation movement engaged in armed conflict with a High Contracting Party makes a unilateral declaration in accordance with Article 96, paragraph 3, of the Protocol.49 If a provision in the Conventions deals with the same subject as a provision in the Protocol but diverges from it, the latter provision will prevail, provided that it does not adversely affect the situation of protected persons as governed by the 1949 Conventions or restrict the rights which the Conventions confer upon them.50
b) If not all belligerents are party to Protocol I, there are two distinct relationships:

- Those which are party to the Protocol are bound by it both in their mutual relations and towards a belligerent which, though not party to the Protocol, has agreed to accept and apply its provisions.\(^51\)
- In relations between belligerents which are party only to the Conventions and have not given the latter undertaking, and between them and belligerents which are party to the Protocol, the Conventions alone will apply.

c) Lastly, if only one belligerent is party to Protocol I (or if none of them is), the Conventions alone will apply.

The binding force of Protocol II and the conditions governing its application raise particular problems which will be discussed in Chapter IIB, dealing with non-international armed conflicts (page 337–40).

3. The effects of the Additional Protocols with regard to the ICRC

Like the Geneva Conventions, there is nothing to prevent the Protocols granting the ICRC rights which it is fully entitled to invoke, as well as obligations which are binding insofar as the Committee has agreed to them. This is confirmed in the first part of Article 81, paragraph 1, of the Protocol:

> The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts ...\(^52\)

It is therefore clearly established that the Geneva Conventions and Protocol I assign humanitarian duties to the International Committee. But how could instruments of international law – in other words, treaties – assign tasks to any organization other than in the manner provided for by international law, namely by conferring rights and obligations?

Notes

The ICRC and the Protection of War Victims


11 International Review of the Red Cross (IRRC), no. 845, March 2002, pp. 289–97. There are diverging views among governments as to whether Palestine, in whose name instruments of accession were deposited on 21 June 1989, should be considered as a state party to the Conventions; if so, the number of states party (at 31 December 2001) would stand at 190.

12 Common Article 2, paragraph 3.


15 ‘Denunciation in the event of a material breach may here be regarded as a measure of reprisal against a state that has not fulfilled its obligations. This reprisal measure must be directed against the rights granted to the guilty party under the terms of the treaty,’ Guggenheim, Traité de Droit international public, p. 227. A definition of reprisals is given by Rousseau: ‘Reprisals constitute an unlawful act, which may be justified exceptionally by the fact that it is a retort to another unlawful act for which it seeks redress. Their use is subjected by international jurisprudence to a number of conditions: the prior existence of an act violating international law; an unheeded injunction; a reasonable proportion between the violation and the reprisal; the absence of an undertaking not to have recourse to them...’, Rousseau, Droit international public, pp. 140–1.
This does not prejudice the rights of a party which claims to have been harmed by a material breach of the Conventions to other forms of recourse, such as a complaint forwarded by the Protecting Power or the ICRC, an appeal addressed to international organizations or other states, demands for reparations, calls for the punishment of those responsible, etc.


In positive international law, there are, however, numerous exceptions to this principle [i.e. that of contractual autonomy]. While it is true that only those subjects which participate in the creation of norms in international law are empowered to modify or abrogate them, it is nonetheless possible for the product of this common expression of will – in other words, the treaty itself – to impose obligations or confer rights on legal subjects other than the contracting parties themselves. An international treaty may, for example, grant rights to natural or legal persons subject to national law, or impose obligations upon them, without their legal acts being imputed to one of the contracting parties’, Guggenheim, Traité de Droit international public, p. 198.

Article 126, paragraphs 1 and 2.

Article 126, paragraph 4.


Regarding relations between states, Article 35 of the Vienna Convention on the Law of Treaties requires that express acceptance of an obligation be given in writing.

XVIIth International Conference of the Red Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims, Document 4a, p. 132.

The Nigerian civil war was not an international armed conflict in the terms of Article 2 of the Geneva Conventions of 12 August 1949, but a non-international conflict in the sense of Article 3 common to the Conventions. However, on the basis of declarations made by Nigeria’s federal military government, in particular the announcement of 31 May 1967 imposing a blockade along the coast of the secessionist Eastern Region, the ICRC considered that the whole of international humanitarian law was applicable to the conflict. It accordingly based its work on the Geneva Conventions, notably on Article 23 of the Fourth Convention. Details are given in the work by Thierry Hentsch, Face au Blocus: La Croix-Rouge internationale dans le Nigeria en guerre (1967–1970), Graduate Institute of International Studies, Geneva, 1973, especially pages 225–30.


This concern led the ICRC, in 1956, to formulate Draft Rules for the limitation of the dangers incurred by the civilian population in time of war. This draft, intended primarily to protect civilians against indiscriminate attacks, included (or restated) the prohibition of atomic, bacteriological and chemical weapons. When submitted to the Nineteenth International Conference of the Red Cross (New Delhi, 28 October to 7 November 1957), it was criticized by delegations of countries possessing nuclear weapons, in particular the United states and its allies. In Resolution XIII, the Conference requested the ICRC to transmit the draft to the governments for their consideration. But the ICRC’s efforts had, in


40 Protocol I, Article 96, paragraph 2.
41 Protocol I, Article 99.
42 See Resolution 2625 (XXV) 1970 of the UN General Assembly.
43 *Official Records CDDH*, vol. VIII, p. 102 (document CDDH/ISR.13).
44 Protocol I, Article 1, paragraphs 3 and 4.
45 As laid down by Article 95, paragraph 2, of the Protocol.
46 Article 20.
47 Articles 51, paragraph 6, 52, paragraph 1, 53(c), 54, paragraph 4, 55, paragraph 2, and 56, paragraph 4 of the Protocol.
48 Articles 92, 93 and 94 of the Protocol.
49 Article 96, paragraphs 1 and 3.
50 Under the terms of Article 6(6)/6(7) common to the 1949 Conventions, the contracting parties are forbidden to conclude any special agreements which derogate from the Conventions in a way detrimental to the persons protected.
51 Article 96, paragraph 2.
52 Article 81, paragraph 1, of the Protocol.

References

I-A


I-B


CHAPTER II

GENERAL TREATY RULES
APPLICABLE TO
NON-INTERNATIONAL ARMED
CONFLICTS

II-A. ARTICLE 3 COMMON TO THE GENEVA
CONVENTIONS OF 12 AUGUST 1949

1. The origins of Article 3

The civil wars in Russia and Spain had shown that it was possible to help the
victims of internal conflicts – but that in the absence of any legal basis, such
action was extremely precarious.

Above all, those two wars had shown the need to draw up a legal
framework applicable to non-international armed conflicts, in order to
prevent a return to the atrocities inevitably produced by any fratricidal
struggle.

This was one of the aims which the International Committee set itself at
the start of the preparatory work which was to lead to the adoption of the
1949 Conventions. No other issue was considered at such length, and very
few others gave rise to such impassioned debates.

The difficulties were obviously enormous. The deep-seated resistance of
governments to any international regulation of matters they consider to be of
exclusive national jurisdiction is well known; states are never so concerned
about their sovereignty as when they feel it is threatened.

Furthermore, the very concept of non-international armed conflict is mis-
leading, giving the impression that all such struggles are the same. But they
certainly are not, as can be seen when comparing internal conflicts with wars
between nations.

The latter include all conflicts between two states or groups of states. The
scale of the fighting and the relative power of the belligerents may vary enor-
mously, but the fact that there are sovereign states on each side, each with its
government, territory, population and regular armed forces, clearly puts all
such conflicts in the same homogeneous category.

The same cannot be said for non-international conflicts. From a socio-
logical point of view, there exists a wide variety of conflict situations ranging
in an unbroken progression from local riots or isolated, sporadic acts of vio-
ience to outright civil war between two organized groups separated by a front
line, each controlling part of the national territory and the population. It is possible for one and the same conflict to escalate from one extreme of the scale to the other: an uprising, local at first, gradually spreads, to culminate in pitched battles resembling those of an international war.

Quite apart from the sensitivity of governments referred to above, it is easy to see the problems inherent in trying to establish a legal framework to cover such diverse situations.

Since there could be no question of applying the entirety of the Geneva Conventions to all situations of internal unrest – in the case of riots or isolated and sporadic acts of violence it would have been incommensurate to do so – two possibilities arose: either a) to apply all their provisions to a limited number of conflict situations, or b) to apply a limited number of humanitarian rules to all non-international armed conflicts.1

The Stockholm Conference had come out in favour of applying all provisions of the Geneva Conventions to non-international conflicts, although without specifying the threshold of violence beyond which they should take effect;2 the 1949 Diplomatic Conference therefore unhesitatingly chose the first option. However, as discussions wore on and draft after draft was debated, the Conference laid down conditions which were so restrictive that, according to experts, they would not have been met even in the Spanish Civil War.3 In other words, the Conference came close to adopting a set of rules which could never have been applied.

The French delegation deserves credit for extricating the Conference from that impasse: it proposed the reverse of what had first been considered, namely the adoption of a minimum of rules which could be applied in full to every non-international conflict, whatever its scale and duration, and however organized the insurgent faction might be.

The Conference thus came to adopt Article 3 common to the four Geneva Conventions of 1949, which is in effect a ‘convention in miniature’4 applicable to all non-international armed conflicts:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.  

2. The validity of Article 3

It is now necessary to look at the circumstances in which Article 3 is supposed to apply, and at its implications for the parties to a conflict.

The Diplomatic Conference has sometimes been criticized for not having defined the concept of ‘non-international armed conflict’, and for not having set the threshold beyond which an internal conflict would be subject to the provisions of Article 3.

These criticisms are unfounded; the intentions of the Conference leave no room for doubt. The field of application for Article 3 stems from its contents: it amounts to a set of minimum rules to be applied in all situations of non-international armed conflict.

This was stressed by the rapporteur of the working party which drew up Article 3:

Mr Lamarle presented the text drawn up by the second Working Party … . He pointed out that it offered in all cases and circumstances the chief advantage of permitting the automatic implementation of concrete and precise provisions which were the essence of humanitarian rules to be observed in cases of armed conflict not of an international character.  

The same point was made in the report by the Joint Committee to the Plenary Assembly of the Conference:

The Draft of the second Working Party … abandons the idea of applying the Convention as a whole and also of defining the objective conditions which would make it obligatory. It repeats the words of the Stockholm text: ‘conflict not of an international character’ and lays down a minimum of humanitarian rules which both Parties are bound to respect.

That Article 3 does indeed constitute a minimum set of rules, intended to apply to all situations of non-international armed conflict, is therefore clear beyond question.
The concept of ‘non-international armed conflict’, however, still needs to be defined. The 1949 Conference did not do so, to the (unwarranted) confusion of some experts. The fact is that only the widest possible interpretation of the term is compatible with the minimal content of the obligations which the article imposes on the parties to the conflict.

The Commission of Experts convened by the ICRC in October 1962 understood this perfectly:

In the Commission’s opinion, the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against a legal government, is of a collective character and consists of a minimum of organization. In this respect and without these circumstances being necessarily cumulative, one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action on a part of the territory, the degree of insecurity, the existence of victims, the methods employed by the legal government to re-establish order, etc.8

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law confirmed this broad interpretation by giving a negative definition of non-international conflicts in Article 1, paragraph 2, of Protocol II: ‘This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.’ Conversely, any concerted, armed operation, any armed action of a collective nature and marked by a minimum of organization, constitutes a non-international armed conflict to which Article 3 will apply.

In practice, a government cannot deny the existence of an armed conflict, within the meaning of Article 3, when faced by collective armed action which cannot be suppressed by ordinary means, such as the police and the enforcement of ordinary criminal legislation. The use of the military and the promulgation of special powers would, in the large majority of cases, be conclusive evidence that the situation in question is indeed an armed conflict in the sense of Article 3.

Article 3 therefore applies to all conflict situations which are neither internal disturbances nor civil wars in which the government side has claimed for itself or recognized for its enemy the status of belligerent, but applies to all armed conflicts between these two extremes. In the event of a recognition of belligerency, most of the law of war – hence most provisions of the Geneva Conventions as well – becomes applicable, with the effect that the minimum provisions contained in Article 3 are subsumed in the implementation of a much wider set of rules.

The binding force of Article 3 for the parties to a conflict must now be considered. Is the article equally binding on all parties, and if so, what is the basis for this?

There is no difficulty here with regard to the side which claims to be the legal government: as such, it is bound by its country’s ratification of or
accession to the Geneva Conventions. As the 1949 Conference ruled out any conditions based on form or reciprocity, Article 3 applies immediately, irrespective of any recognition of belligerent rights and whatever the supposed attitude of the opponent.

But what of the insurgent party? Is it bound by a treaty to which it has not subscribed? The 1949 Conference assumed without any hesitation that it was, but did not give any basis for this obligation which, according to one expert opinion, ‘... may be legal heresy, but ... necessary heresy’.9

For its part, the International Committee has sought to establish the binding force of Article 3 for the insurgent side on the basis of the effects of treaties with regard to individuals:

... insurgents are assumed to know article 3, and its application by them is compulsory when conditions so require. These provisions – and herein lies the revolutionary innovation of this article – must be applied by authorities which were not in existence when the state, by ratification or accession, became a party to the Conventions. Adherence to these Conventions is binding not only on the government, but also on the population of the state concerned.10

This explanation is hardly convincing.

As a general rule, an international treaty does not have any direct legal effects on individuals. In most cases such effects come about after a treaty passes into the domestic law of the contracting states,11 which thereafter becomes the direct source of the obligation.

Both state practice12 and international jurisprudence13 have, however, recognized that treaties can establish legal rules directly affecting individuals, if such is the intention of the contracting parties. There is nothing to prevent, a priori, a treaty granting rights to individuals, which they may insist on, or obligations which individuals are called upon to respect, irrespective of whether the treaty has passed into domestic legislation. What counts is the intention of the contracting parties.

But was this indeed the intention of the 1949 Diplomatic Conference? Eminent legal scholars have maintained that the laws and customs of war are based on the presumption that their provisions are binding not only on states but also on individuals;14 they do not, however, put forward any clear arguments in support of this view.

I believe that the question of the effects of the Geneva Conventions on individuals cannot be decided without taking account of the content of the rules and of the entities or persons to whom they are addressed. It is, of course, quite clear that the vast majority of the rules are intended for the state and its institutions, and that their purpose is to impose obligations on parties to conflict which amount to rights for persons protected by the Conventions. On the other hand, the provisions designed to impose obligations on individuals are an exception; in every case they are obligations that are concomitant to the exercise of the rights that the Conventions confer on protected persons.15
The obligations imposed by Article 3 on parties to a conflict are of a different kind. Should it then be accepted that Article 3 derogates from the general tenor of the Geneva Conventions by imposing obligations on individuals which are binding in themselves and not as a corollary of certain rights? If so, it is regrettable that the Diplomatic Conference failed to clarify this point.

But however Article 3 is construed, there can be no question of invoking some supposedly general rule under which a state’s international obligations are equally binding on its citizens. No such rule exists.

So if one accepts that adherence, by ratification, accession or succession, to the Geneva Conventions entails obligations for all state institutions – including members of the armed forces and the public services, it does not necessarily follow that adherence is equally a source of obligations binding on individuals. Such obligations would have to be demonstrated, and to my knowledge no such demonstration has been made.

A second – and, in my opinion, sounder – explanation derives from the principle that a treaty is a commitment for the state as a continuing entity, and not just for the particular government which signed it. Therefore, any authority – government or insurgent – which claims leadership of the state and the right to exercise the power of the law is bound to respect the state’s international obligations.\footnote{In the final analysis, the binding force of Article 3 for an insurgent movement stems from that movement’s claim to represent the state.}

However, there is another drawback to these two explanations. Whatever the legal implications, for insurgents, of a state’s adherence to the Geneva Conventions, they can hardly be expected to feel that decisions taken by a government against which they have taken up arms, and whose legitimacy they challenge, constitute any obligation for them. All internal conflicts result from a rejection of allegiance and a disintegration of the social fabric; in such circumstances it would be illusory to think that legal arguments may be convincing. Insurgents challenge the authority of the ‘legal government’ to represent the state – and hence the validity of the state’s adherence to the Geneva Conventions; a secessionist movement contests the authority of the legal government to enter into commitments on behalf of the breakaway territory.

Therefore another way has to be found to assess the binding force of Article 3 for an insurgent movement. This, I believe, can only be done by taking into consideration the article’s content.

It must be borne in mind that Article 3 represents only a minimum set of essential rules which must be respected in all circumstances. Its fundamental nature is highlighted both by the basic obligations it imposes on the parties to a conflict and by the wording of the article itself\footnote{At each stage of the drafting of Article 3, the Conference repeatedly stressed that it was to be no more than a minimum set of rules, which it hoped would be surpassed by the implementation of broader rules.} and of the preparatory work.\footnote{At each stage of the drafting of Article 3, the Conference repeatedly stressed that it was to be no more than a minimum set of rules, which it hoped would be surpassed by the implementation of broader rules.}
The provisions contained in the first paragraph of Article 3 are no more than the codification of existing customary rules, as is confirmed in the phrase ‘... the following acts are and shall remain prohibited at any time and in any place ...’. These are rules common to both international law and the domestic legislation of civilized nations, applicable to both peace and war; rules which, in fact, no insurgent movement could transgress without incurring the condemnation of the civilized world.

Similarly, the mention of the right of initiative accorded to the ICRC and any other impartial humanitarian body is not of a constitutive nature; it is simply the confirmation of an existing right, as the Conference itself stressed.

Since the third paragraph of the article is in the nature of an exhortation, and the purpose of the fourth is to limit the article’s legal effects without imposing any further obligation on the parties to it, the whole of Article 3 must be seen essentially as restating customary law.

Article 3 furthermore responds to a requirement of humanity in seeking to uphold the most elementary humanitarian rules during an internal conflict, in other words those which are truly indispensable for a person’s survival. It also meets an important social need, since only through respect for its provisions can a relapse into the barbarity of darker days be avoided.

Finally, it should not be overlooked that the 189 states party to the Geneva Conventions have accepted Article 3 without reservations. The binding force of Article 3 therefore derives from the fundamental nature of the rules it contains and from their recognition by the entire international community as being the absolute minimum needed to safeguard vital humanitarian interests. It also derives from international custom, the laws of humanity and the dictates of public conscience.

These rules are core standards that neither governments nor insurgent movements can possibly ignore without thereby exposing their own criminal nature and putting themselves totally beyond the pale of civilization. In complying with Article 3, an insurgent movement distinguishes itself from a disreputable band of outlaws.

Thus the binding force of Article 3 exists irrespective of the ratification of the Geneva Conventions by the state in question.

The foregoing conclusion is as valid for the party claiming to be the legal government as it is for the insurgents, since there is little doubt that by virtue of international custom, the laws of humanity and the dictates of public conscience, a state not party to the Conventions is nonetheless bound by the basic rules contained in Article 3. This conclusion was moreover implicitly accepted by the spokesman of the only delegation which, from start to finish of the 1949 Conference, systematically opposed the adoption of any provisions concerning non-international armed conflicts.

Although, strictly speaking, there is no international legislative authority whereby a majority would be allowed to impose decisions on a minority without the latter’s consent, it is certain that the international community
does have the power to establish rules of a basic nature without which no international order could survive. As general international law, they apply to all subjects of the international legal order, and therefore also to insurgent movements. The basic humanitarian principles contained in Article 3 clearly form part of these rules.

II-B. PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS

1. The origins of Protocol II

The numerous internal conflicts which have occurred since 1949 have fully confirmed the importance of Article 3. No other article of the new Geneva Conventions has so frequently been invoked, and it is certain that no other single article has achieved as much.

However, these conflicts have also shown its limitations. As a minimum set of rules, Article 3 offers victims of internal conflicts no more than rudimentary protection which, more often than not, should have been enhanced by the implementation of other provisions from the Conventions, such as those concerning help for wounded and sick combatants, the protection of medical units, the status of prisoners, the protection of civilians, relief operations, and so on. The fact is, though, that the belligerents have virtually never reached agreement on a wider application of the Conventions, with the result that Article 3 – which should merely have been seen as a minimum guarantee, a kind of humanitarian safety net – has all too often been regarded as the general standard for humanitarian protection in such situations.

It is therefore easy to understand the many calls for the protection of victims of internal conflicts to be increased by adopting new rules to supplement the provisions of Article 3.

The ICRC took the lead in this movement for change. Following the meetings of government experts in Geneva in 1971 and 1972, the ICRC formulated a draft protocol additional to the 1949 Geneva Conventions and relating to the protection of victims of non-international armed conflicts (Protocol II); this served as the basis for discussion at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law which met in Geneva from 1974 to 1977.

This draft was first examined in the Conference Committees. In response to proposals by Western delegations, the Committees adopted several amendments designed to strengthen the protection of victims of non-international conflicts but which, in doing so, also increased the obligations imposed on the parties to a conflict. These proposals were undoubtedly motivated by genuine humanitarian concern, but they failed to take sufficient account of the reservations of a growing number of Third World countries. In fact, from
the moment that Article 1, paragraph 4, of Protocol I was adopted, removing wars of national liberation from the category of internal conflicts and classifying them among international armed conflicts, a great many Third World governments lost all interest in Protocol II. They felt considerable misgivings about the adoption of rules that were likely to curtail their freedom of action in quelling insurgency and safeguarding their still-fragile national unity. When the Committees ended their work, there were good reasons for supposing that the resulting draft would fail to garner the two-thirds support needed to ensure its adoption by the plenary assembly.

At this point the Pakistan delegation proposed replacing the draft produced by the Committees, which had forty-seven articles, with a new draft of twenty-eight articles, heavily watered down and from which all provisions substantially reducing the freedom of action of parties to a conflict had been deleted. While the Committees had spent the greater part of seventy-seven meetings discussing the ICRC’s draft – not to mention countless meetings of working parties – the Plenary Assembly rushed through its examination of the Pakistan project in only six meetings, in an atmosphere reminiscent of a closing-down sale.

After the adoption of Protocol II, some twenty delegations made it clear that although they had agreed to a consensus, it was not because they approved of the new rules it contained, but only because they had not wanted to prevent its adoption by other states. In the event of a vote, these delegations would have abstained. The façade of consensus had begun to crack even before the Final Act was signed.

Let there be no illusions: despite the last-minute rescue operation carried out by the Pakistan delegation, the story of Protocol II is a tale of shipwreck.

2. The binding force of Protocol II

The material field of application of Protocol II is stated in Article I, paragraph 1:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol II’s field of application is therefore more restricted than that of Article 3 of the Conventions: whereas the latter applies to all non-
international armed conflicts, the Protocol applies only to those which meet a number of given material conditions. Below the threshold of hostilities defined in Article 1 of the Protocol, Article 3 alone applies; above that threshold, Article 3 and the Protocol apply equally.

But make no mistake: the application of Protocol II is determined by the de facto existence of certain circumstances and does not depend on whether their existence is recognized by the parties to a conflict. This view is confirmed by the fact that the Diplomatic Conference rejected a proposal by Colombia to make the application of the Protocol subject to the acknowledgement of these circumstances by the government of the country concerned.34

Here the question arises as to the binding force of Protocol II for the parties to a conflict.

With regard to the party claiming to be the legal government, the answer is clear. It is bound by the state’s adherence to the Protocol.

But what of the insurgent party? Article 5 of the ICRC’s draft included a provision relating to the rights and duties of the parties to a conflict: ‘The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.’35 In support of its proposal, the ICRC made the following comment:

The experts several times voiced their concern that the insurgent party might only be lightly bound by the Protocol, and the view was expressed that it would be desirable to make an attempt to strengthen its obligations. In this regard, the present draft follows a technique similar to the one adopted in common Article 3: an engagement entered into by the state is not only binding upon the government but also upon the constituted authorities and the private individuals who are on the national territory, upon whom certain obligations are thus imposed; this is a technique frequently adopted in contemporary international law. Article 5 implies that it is this same technique that is followed in the present draft and clearly indicates that the rights and duties of private individuals extend over a range that is identical to that of the rights and duties of state organs.36

So once again, the ICRC sought to establish the basis for the Protocol’s binding force on insurgents on the theory of the effect of treaties on individuals. As indicated above, this theory must be viewed with serious reservations. In the case in point, one cannot help wondering whether the ICRC was not mistaking its own high hopes for the reality of international legal relations.

However that may be, the Diplomatic Conference rejected draft article 5 along with all the other provisions which would have established identical rights and obligations for both governments and insurgents.37 This made it questionable to rely on the theory referred to above. Nor can the foregoing conclusions reached with regard to Article 3 be applied to Protocol II, since unlike that article it does not represent a minimum set of rules accepted by the entire international community.

Having turned down draft article 5, the Diplomatic Conference should have provided for some other means of giving the Protocol binding force vis-à-vis insurgents. It did not do so.
Under the circumstances – and given the current level of ratifications of Protocol II – I do not believe that this treaty constitutes a source of rights and obligations for an insurgent movement which has not agreed to accept them. The failure of the Conference to establish any procedure allowing such a movement to undertake to respect the Protocol can only be deeply regretted.

It is as though an architect built a house and forgot to include an entrance door.

3. The effects of Protocol II on the ICRC

In seeking to determine the effects of Protocol II on the ICRC, it must be remembered that at the last minute the Diplomatic Conference rejected the draft compiled by its Committees, which was based on the ICRC’s own proposals. It did so in favour of another draft, some of whose provisions – in particular Article 18, paragraph 2 – risk being interpreted in a sense quite contrary to that of the proposals put forward by the ICRC.

The International Committee would therefore have been justified in stating that it could not be bound by these new provisions.

Since then, however, it has consistently urged governments to become party to Protocol II. It must therefore be concluded that the ICRC has accepted the Protocol’s contents, while stressing the fact that its own universally recognized right of humanitarian initiative has been entirely preserved. Indeed, it is unthinkable that the ICRC would ever have accepted provisions or interpretations which fell short of the provisions of Article 3 of the 1949 Geneva Conventions.

Notes


4 It seems that this term was coined by the Soviet delegation. Final Record 1949, vol. II-B, pp. 35 and 326.


6 Final Record 1949, vol. II-B, p. 82.

7 Ibid., p. 129.


10 XXIst International Conference of the Red Cross, Istanbul, September 1969, Protection of Victims of Non-international Conflicts, report submitted by the ICRC, IRRC, no. 100, July 1969, pp. 343–52, esp. pp. 345–6. In its appeal of 11 June 1965 concerning the situation in Vietnam, the ICRC used the same argument to try to establish that the Geneva Conventions were binding on the National Liberation Front: ‘The National Liberation Front too is bound by the undertakings signed by Viet Nam’ (the text of the appeal is in IRRC, no. 53, August 1965, pp. 417–18). As might have been expected, the NLF flatly rejected this view, declaring that it was not bound by treaties which it had not signed itself, IRRC, no. 57, December 1965, p. 636.

11 As regards the Geneva Conventions, the enactment of domestic legislation is expressly called for in a number of provisions, most notably by common Article 49/50/129/146.


13 Permanent Court of International Justice, ‘Case of the Jurisdiction of the Courts of Danzig (Pecuniary claims of Danzig railway officials who have passed into Polish service, against Polish Railways Administration), Advisory opinion of March 3rd, 1928’, Collection of Advisory Opinions, series B, no. 15, pp. 4–47, in particular pp. 16–21.


15 This is notably the case of common Article 7/7/7/8, which forbids protected persons to renounce the rights accorded them by the Conventions, and of Article 4 of the Third Convention which lays down the conditions which combatants who are not members of the armed forces must observe in order to benefit from the protection of the Convention.


17 ‘… each Party to the conflict shall be bound to apply, as a minimum, the following provisions…’ (emphasis added).

18 See, for example, Final Record 1949, vol. II-B, pp. 82, 123, 129, 335, 337, etc.

19 This is precisely the aim of Article 3’s third paragraph.

20 To avoid any misunderstanding it should be noted that the term ‘civilized nations’ is used to mean countries with a legal system, and has no ethnic connotations.
21 See Final Record 1949, vol. II-B, p. 335 (remarks by Bolla).
22 ‘The right of initiative of the International Committee of the Red Cross or any other impartial humanitarian body was safeguarded’ – this was emphasized in three places in the Seventh Report of the Special Committee set up by the Joint Committee – Final Record 1949, vol. II-B, pp. 122–3.
23 The reservations announced by Argentina and Portugal on signing the Conventions were not maintained when it came to ratification. For more about this, see the study by Claude Pilloud, Reservations to the Geneva Conventions of 1949, ICRC, Geneva, 1976, pp. 12–13. 
On the question of Palestine’s accession to the Geneva Conventions, and that of the number of states party to the Conventions, see note 11, Chapter I of Part Two, p. 326.
24 ‘Les insurgés sont tenus d’observer les règles de l’article 3, non pas en vertu de l’adhésion ou de la ratification du gouvernement établi, mais conformément au désir de la communauté internationale, dont ce gouvernement n’est que l’agent en l’occurrence – cas où le dédoublement fonctionnel … est particulièrement évident’ (Insurgents are bound to observe the rules of Article 3, not by virtue of the accession or ratification by the established government, but in accordance with the desire of the international community, of which that government, on the point in question, is no more than an agent – a case in which a government’s duty to act both as the representative of its particular state and as a member of the international community … is particularly evident), René-Jean Wilhelm, ‘Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international’, Collected Courses of the Hague Academy of International Law, vol. 137, 1972, no. III, p. 368 (emphasis in the original).
25 ‘… the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation’, stated the International Court of Justice with regard to the Convention on the Prevention and Punishment of the Crime of Genocide (‘Reservations to the Convention on Genocide, Advisory Opinion of 28 May 1951’, I.C.J. Reports 1951, p. 23). This observation is also valid for the basic principles underlying the Geneva Conventions and, in particular, those expressed in Article 3; this was stressed by the International Court of Justice in its judgment of 27 June 1986 in the case concerning military and paramilitary activities in and against Nicaragua ((Nicaragua v. the United states of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 114).
28 Document CDDH/402; to my knowledge, this does not appear in the Official Records of the Diplomatic Conference. For the text of the articles adopted by the Committees it is therefore necessary to consult the reports compiled by them at the end of each of the four sessions of the Conference, published respectively in volumes X (Reports of Committee I), XIII (Committee II) and XV (Committee III) of the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974–1977), Federal Political Department, Berne, 1978, 17 volumes (hereinafter Official Records CDDH).
29 Document CDDH/427 Corr.1; I do not believe that this document is included in the Official Records either. It is possible, however, to reconstruct its substance from the Table of Amendments to Protocol II, Official Records CDDH, vol. IV, pp. 1–121.
30 Committee I: the 22nd, 23rd, 24th, 29th, 30th, 32nd, 33rd, 34th, 39th, 40th, 59th, 62nd, 63rd, 64th, 67th, 73rd and 76th meetings; Committee II: the 21st, 25th, 26th, 27th, 28th, 31st, 32nd, 33rd, 34th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 50th, 51st, 53rd, 57th, 58th, 59th, 60th, 67th, 68th, 73rd, 79th, 80th, 81st, 88th, 89th, 90th, 93rd, 94th, 95th, 98th and 99th meetings; Committee III, the 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 14th, 16th, 17th, 18th, 20th, 22nd, 24th, 25th, 32nd, 37th, 38th, 46th, 49th and 59th meetings.


35 *Draft Additional Protocols*, p. 34.

36 *Draft Additional Protocols: Commentary*, p. 135.


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**References**

**IIA**

The ICRC and the Protection of War Victims


Unfortunately, the analysis of Article 3 common to all four Geneva Conventions which appears in the *Commentary* published under the auspices of the ICRC must be viewed with serious reservations. It in fact interprets this article in the light of drafts, later rejected, whose intention was the exact opposite of what actually led to the adoption of Article 3 (*Commentary*, vol. I, pp. 37–61; vol. II, pp. 31–9; vol. III, pp. 27–44; vol. IV, pp. 25–44).

IIB


CHAPTER III

CUSTOMARY INTERNATIONAL LAW

Custom is the lord of all.
Pindar

1. Introduction

Does the International Committee possess rights or obligations that are founded in customary law, and which are therefore binding on subjects of the international legal order, irrespective of any formal treaty obligations?

Before seeking to answer this question, we must define what we mean by ‘customary international law’.

It is generally acknowledged that international custom is established as a result of a regular practice being recognized as law. Custom is therefore composed of two elements. The first is uniformity of practice, in other words the continuous repetition of the same behaviour over the years: the similarity of positions adopted in similar situations by different subjects of law provides evidence of the existence of a sufficiently extensive and uniform practice. It is a factual element (usus), present when the behaviour of subjects of law is supported by a sufficient number of precedents. However, the existence of corroborative precedents does not in itself establish the existence of a legal rule, since these precedents might have come about for the sake of expediency, with those concerned reserving the right to adopt a different course on another occasion if they saw fit. For there to be a customary rule – and here the second constituent element of customary law comes into play – there must also be recognition that this continuous and uniform practice corresponds to a necessity or duty; in conforming to it, subjects of law must be convinced that they are exercising a right or fulfilling an obligation. The binding force of custom flows from this very conviction. It is the intellectual element of custom which jurists call opinio juris sive necessitatis, in other words belief in the existence of a right or an obligation.1

A customary rule therefore arises from the conjunction of two elements: uniform practice and legal conviction. Article 38 of the Statute of the International Court of Justice defines custom as ‘a general practice accepted as law’.2

Having defined our terms, we can now return to the question: does the ICRC have rights and obligations founded in international customary law?

To look first at the position of the International Committee itself, although the ICRC has constantly referred to what it calls its ‘tradition’, its ‘traditional tasks’ and its ‘traditional mandate’, I am unaware of any documentary
evidence that the Committee has invoked international custom as a source of any rights, powers and obligations it might possess.

There is no doubt that the notion of ‘tradition’ implies the continuity of doctrine or a regular practice; it therefore embraces the element of constancy and uniformity indispensable to the establishment of a legal rule. However, it does not necessarily include the notion of legal conviction, the acknowledgement of a practice accepted as law. In any case, the notion of tradition is not defined in international law and is not really part of the legal vocabulary.

So the question cannot be answered simply by identifying tradition with custom, for while the two concepts are similar, they are not quite the same.

Nor can it be argued that the ICRC has no rights and obligations under customary law merely because it has never invoked that law as a source of its rights and obligations. There are other reasons why it may not have done so. Two of these should be mentioned.

a) Surprising though it may seem, the ICRC has no complete record of its own practice. To establish the existence of a customary rule, it would be necessary to carry out exhaustive archival research, examine numerous precedents, analyse the ICRC’s correspondence with various governments, and so on. Given the pressure of the ICRC’s operational work, such a task would be out of the question.

b) The existence of a customary rule must be proved. The difficulties in doing so cannot be over-stated, even in a well-established case such as that of the SS Lotus, which came before the Permanent Court of International Justice. It is not sufficient to establish the existence of precedents – it must also be shown that these precedents result from a legal conviction, and to do this one has to know the underlying intentions of the governments concerned, which they are rarely inclined to specify.

The ICRC is a charitable organization. Even when it has no doubt itself about its rights, it is above all anxious to avoid becoming embroiled in legal controversies which might paralyse its practical work for people it is mandated to protect. When it is unable to base its work on a precise legal provision, whose interpretation and binding force are unquestionable, it prefers either to do so on its right of humanitarian initiative or else to appeal to the belligerents’ good will. So the fact that it does not enter into arguments of a legal nature should not be taken to imply the absence of any legal conviction on its part.

As no conclusions can be drawn from the Committee’s public statements, the question whether the ICRC possesses rights and obligations under customary law remains open. It must therefore be considered in greater depth, distinguishing between the material rules and the procedural rules. Among the latter, the only one which merits close study as to its possible customary basis is that which grants the ICRC a right of proposal – generally termed its right of humanitarian initiative.
2. The material rules

The first part of this book described the action taken by the ICRC during the main conflicts which took place between its foundation and the end of the Second World War and highlighted the extraordinary number of precedents created by the Committee through its efforts to protect the victims of war. Particularly striking was the ICRC’s consistent conduct in three areas of work: the activities of the Central Tracing Agency, visits to prisoners, and relief operations for war victims – the wounded and sick, prisoners of war and civilians.

These precedents undoubtedly prove the existence of a regular practice. Even if the International Committee is thought to play no part in the establishment of public international law – a view I do not share – it is nonetheless clear that governments have responded to the ICRC’s initiatives and agreed to co-operate with it. As the ICRC cannot force its services upon unwilling recipients, not one of its activities could take place without the acceptance of belligerent and neutral states. Hence, the consistent practice of the ICRC induces a generally uniform attitude of governments.

A detailed examination of the activities carried out by the ICRC with the belligerent states’ consent, and sometimes at their request, reveals enough concurring precedents to deduce the existence of a constant and uniform practice. The material element needed for the establishment of a customary rule is there.

Yet does this amount to legal conviction? In other words, do we have that indispensable intellectual component of custom, the opinio juris sive necessitatis?

In seeking an answer, primary consideration must be given to the ICRC’s practice during the two world wars. As has been seen, the International Committee was able to carry out its activities in almost all the belligerent states, as well as in most of the neutral countries housing civilian refugees or interned members of the armed forces. The factors impeding the ICRC’s work – in particular Germany’s attitude towards Soviet prisoners of war, the inhabitants of occupied territories and civilian detainees, and that of Japan towards Allied prisoners of war – were ruled illegal by the international military tribunals at Nuremberg and Tokyo, and do not in themselves constitute an obstacle to the establishment of a customary rule.4

Was such consistency of conduct on the part of the vast majority of belligerents involved in two world wars merely a matter of expediency, or was it a sign that they acknowledged a legal obligation?

The latter is indeed more likely. But for any degree of certainty, the reasons why the governments decided to accept the ICRC’s offers of services would have to be closely examined. Their reasons were not necessarily identical, for although many governments probably did believe that granting certain facilities to the ICRC was a humanitarian duty, or at least necessary in order to conform to the minimum standard which international law guarantees to
foreigners, expediency may also have played a part, particularly their desire to ensure, by maintaining reciprocity, the protection of their own nationals in enemy hands. A study of the governments’ motivations would call for research far beyond the scope of this book. On the basis of the information available, their acknowledgement of a legal obligation can only be presumed.

However, the reasoning of the International Committee itself must also be taken into account.

The ICRC is guided by the conviction that it is not only empowered to take initiatives to protect the victims of war, but that it also has a humanitarian mandate under which it is obliged to carry out specific tasks to protect and assist those victims; in particular, these include taking practical steps to operate the Central Tracing Agency, to visit prisoners of war and civilian internees and to carry out relief operations. The Committee does not consider these as optional activities, to be undertaken or not according to circumstances or its own wishes, but as duties which the international community has entrusted to it and which it must fulfil. Even before it called for the authority vital for the accomplishment of its task, the ICRC saw itself as having duties which made certain forms of conduct mandatory for it.

This conviction is expressed in its Statutes; those of 10 March 1921, revised in 1930, state that the ICRC’s particular function is to be a neutral intermediary whose intervention is recognized as necessary, especially in cases of war, civil war or internal strife… [to] coordinate efforts to relieve victims of conflict from the suffering which results from war…, [and to] perform the duties assigned to it by the International Conventions.

Similarly, the Statutes adopted on 21 June 1973 and last revised in May 1991 state that the role of the ICRC shall be in particular to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law, [to] endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results [and to] ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions.

This conviction is also expressed in the Committee’s offers of services. In its messages to the belligerents in September 1939, the ICRC stated that it had ‘the duty’, as soon as hostilities began, to propose the organization in Geneva of a central agency for information on prisoners of war. As a corollary to ‘this obligation’, it said it was immediately taking the measures required to begin operating the agency. Among other things, the ICRC also referred to ‘its humanitarian task’ and to the need to ‘assume the humanitarian functions conferred on it’. 
Thus, even in September 1939, the ICRC considered that a humanitarian mission had been assigned to it and that it was consequently duty-bound, if not to achieve results, at least to pursue a certain course of action, namely to provide protection and assistance to the victims of conflicts. The ICRC’s subsequent practice, its wide-ranging activities during the Second World War and in the many conflicts since 1945, its successes and its failures, have all combined to strengthen its belief that it holds a humanitarian mandate which obliges it not only to offer its services but also to carry out a set of prescribed activities whenever the parties to a conflict give it the scope to do so. It is utterly inconceivable that the Committee should regard its own practice over the years, the long series of interventions described in the preceding chapters, as being the result of mere expediency or chance. The accumulation of precedent imposes obligations upon it, if only by virtue of the principle of impartiality which requires it to be equally at the service of all. There can be no doubt that the ICRC’s practice is the expression of a legal conviction.

Nor can there be any doubt that this conviction is shared by the international community. The Geneva Conventions and Protocol I grant the ICRC rights and prerogatives which can only be seen as the corollary of the humanitarian duties assigned to it. It would be hard to accept, for example, that the Third Convention could oblige the detaining power to transmit lists, capture cards and other documents to the Central Tracing Agency without the ICRC being obliged to use these sources of information to relieve the mental suffering brought on by captivity. Similarly, how could there be an obligation on the detaining power to the effect that ‘The special position of the International Committee of the Red Cross [in the field of relief operations] shall be recognized and respected at all times’, unless the ICRC had specific responsibilities in terms of assistance to prisoners of war. Thus, the rights and prerogatives bestowed on the ICRC by the Geneva Conventions and Protocol I – which amount to obligations for the belligerents – must be seen as the counterpart of the ICRC’s humanitarian tasks.

In any case, the ICRC’s humanitarian mandate was explicitly recognized by the 1949 Diplomatic Conference: Resolution 11 stated that:

... the Geneva Conventions require the International Committee of the Red Cross to be ready at all times and in all circumstances to fulfil the humanitarian tasks entrusted to it by these Conventions ....

Article 81, paragraph 1, of Protocol I likewise stipulates that:

The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts ....

It is clearly established, therefore, that the ICRC has been entrusted with humanitarian tasks by the international community.
Are these humanitarian duties founded in conventional law? The Diplomatic Conferences of 1949 and 1974–77 appear to have thought so, without really having studied the question.\(^\text{13}\) It merits examination.

As mentioned above, the ICRC already believed in 1939 that it had been assigned humanitarian functions which required it to fulfil certain corresponding obligations. However, these obligations were not laid down by the 1929 Prisoners-of-War Code, Articles 79 and 88 of which merely gave it the right to make proposals. They could therefore stem only from customary law.

This situation was little changed by the 1949 and 1974–7 Conferences, as can be seen from the tasks and obligations assigned to the ICRC by the Conventions and Protocol I: it is invited to lend its good offices to facilitate the establishment and recognition of hospital and safety zones and localities;\(^\text{14}\) it must obtain approval for the delegates it wishes to appoint to visit prisoners of war and interned civilians;\(^\text{15}\) at the request of the detaining power of prisoners of war, it must appoint the neutral members of the Mixed Medical Commissions set up to examine sick and wounded prisoners and, in agreement with that power, settle the terms of service of these nominees;\(^\text{16}\) if no Protecting Power has been designated, the ICRC must offer its help to the parties to the conflict with a view to designating such a Power\(^\text{17}\) and, if requested by the detaining power of protected persons, it must assume the duties performed by Protecting Powers;\(^\text{18}\) finally, the ICRC must keep lists, available to the High Contracting Parties, of qualified personnel trained to facilitate the application of the Conventions and of Protocol I, and in particular the activities of the Protecting Powers.\(^\text{19}\)

Obviously, the list of duties and obligations assigned to the ICRC by the Conventions and Protocol I by no means covers its entire humanitarian mandate. It is no more than a series of disconnected obligations which, together, do not make up a coherent whole.\(^\text{20}\)

Yet that mandate does exist, and the international community has recognized its importance. Its coherence is the outcome of long practical experience and a host of precedents. Its source lies in customary law: on the one hand it stems from the Committee’s practice and its conviction that it is vested with a humanitarian mandate which imposes obligations upon it; on the other hand, it comes from the acceptance of that legal conviction by the international community and state practice. Only a few isolated parts of the mandate are expressed in the Conventions, in the form of obligations assigned to the ICRC.

To sum up the foregoing analysis:

a) The International Committee is convinced that it has been given a humanitarian mandate which imposes certain obligations upon it.

b) This conviction is shared by the international community.

c) The foundation for the said mandate lies mainly in the ICRC’s practice and in international customary law.

If it is accepted that the ICRC has been given humanitarian duties – with the attendant rights and obligations – of a customary nature, should it not also
be accepted that through its work it contributes to the development of cus-
tomary international humanitarian law? For such is indeed the case. The
history of the ICRC shows that it has played, and continues to play, a major
part in that development, in particular by the implementation of its univer-
sally recognized right of humanitarian initiative.

3. The right of humanitarian initiative

When, on the evening of June 24th 1859, Henry Dunant arrived near the bat-
tlefield at Solferino, he did not stop to ask himself whether he had the right to
call together a few volunteers and give help and comfort to the wounded
and dying, he simply took the initiative to do it.22

It is impossible to ignore the symbolic impact of Dunant’s gesture. It high-
lights an essential feature of the Red Cross: the spontaneous action of any
charitable person seeking to relieve human suffering transcends all rules and
regulations. All the work of the Red Cross for the victims of war originates
from this first initiative.

In the same way, the history of the ICRC is punctuated by a succession of
initiatives. They began with the Conferences of 1863 and 1864 which
brought the Red Cross into being and led to the adoption of the original
Geneva Convention. Then came the Committee’s countless initiatives to
protect war victims, especially the Basel Agency to help wounded military
personnel and the work to provide assistance to able-bodied prisoners of war
in the 1870 Franco-Prussian War, the efforts to protect prisoners of war
during the First World War, and the opening of the Civilian Section of the
International Prisoners of War Agency in October 1914, as well as the
Committee’s intervention in the Russian and Spanish civil wars. More
recently, there were the various activities undertaken during World War II as
a result of the Committee’s initiatives. Apart from a few rare exceptions
where its help was requested by the parties to a conflict, every activity carried
out by the ICRC can be traced back to an initiative taken by it on some
occasion.

This gradual accumulation of precedents could not fail to have legal impli-
cations: the fact that governments frequently agreed that the ICRC could take
initiatives, or at least submit proposals for improving the fate of war victims,
led to it being granted a prerogative generally known as the ‘right of human-
itarian initiative’.

This prerogative was first recognized by the 1929 Diplomatic Conference.
After confirming that the ICRC had the right to propose, to parties to a
conflict, the organization of a Central Prisoners of War Agency, the
Conference made it clear that this was not the full extent of the ICRC’s
authority. Article 79, paragraph 3, of the Prisoners-of-War Code stated:
‘These provisions shall not be interpreted as restricting the humanitarian
work of the International Red Cross Committee.’
The right of humanitarian initiative is stated in a more general way in Article 88 of the Code, after provisions concerning the mandate of the Protecting Powers:

The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may perform for the protection of prisoners of war with the consent of the belligerents concerned.

This article, adopted by the Conference without discussion, is in the section dealing with supervision of the Convention’s application. The initiatives referred to here are therefore primarily those that the ICRC may take with regard to supervision. However, the article does not prevent the Committee from taking initiatives in any other sphere, subject to the consent of the governments concerned.

The expression ‘right of initiative’ is not, in fact, found in the Convention. But by putting the text of Articles 79 and 88 in the positive form, it becomes clear that the ICRC has the right to undertake – subject to the consent of the parties to the conflict concerned – activities other than those expressly mentioned in the Convention. This is none other than the right of humanitarian initiative, and the ICRC interpreted the two articles in this way; it adapted its own Statutes to conform to the new Conventions by introducing the following clause: ‘It is free to take … any humanitarian initiative which comes within its traditional role’.

There was no debate within the Committee over the inclusion of this clause, suggesting that the ICRC saw it as no more than ‘the clear expression of a right which it already enjoyed and which had gradually been consolidated, notably since the 1914–1918 war’.

The right of humanitarian initiative was the main basis for all the ICRC’s activities during World War II.

The 1949 Diplomatic Conference took the ICRC’s practice into account when it included its right of humanitarian initiative in the general provisions making up the first chapter of the new Conventions. Common Article 9/9/9/9/10 states:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of [those persons protected by each Convention], and for their relief.

This article met with no opposition, either at the Seventeenth International Conference of the Red Cross or at the Diplomatic Conference. Its inclusion in the 1949 Conventions has two crucial implications:

a) By repeating the article in all four Conventions, the Conference clearly wanted to show that the International Committee was empowered to take initiatives for the protection and assistance of all persons protected by the Conventions: the sick and wounded in armies in the field; the sick,
wounded and shipwrecked of armed forces at sea; prisoners of war; and civilians.
b) By placing it among the general provisions of the new Conventions, the Conference stressed that the right of humanitarian initiative covered the whole field of application of the Conventions, and that none of the Conventions’ provisions restricted the ICRC’s authority to take initiatives in aid of conflict victims.31

The 1974–77 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law confirmed the ICRC’s right of initiative in the second part of Article 81, paragraph 1, of Protocol I:

The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.32

This article, adopted by consensus in Commission I and then in plenary,33 is a restatement of the law as it stands. Its wording, however, has the merit of making a precise distinction between the tasks that the Committee is fully authorized by the Conventions or the Protocol to undertake, namely those to which the contracting parties have given their prior consent by virtue of their adherence to the said treaties, and on the other hand the additional activities which the ICRC might undertake on the basis of its right of initiative and for which the agreement of the parties concerned must be obtained in each case.

In the case of non-international armed conflicts, the right of initiative is confirmed by Article 3 common to the four Geneva Conventions: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’34 There is no similar provision in Protocol II. This omission does not, however, have any legal consequences, as the Protocol develops and supplements Article 3 without altering its conditions of application, and as the field of application of Protocol II is more limited than that of Article 3, with the effect that all situations covered by the Protocol are also covered by Article 3.35 The International Committee can therefore invoke the right of initiative confirmed in Article 3 for any situation covered by Protocol II. The head of the ICRC delegation to the Diplomatic Conference emphasized this point, and several other delegations agreed to the deletion of a draft article relating to the ICRC in Protocol II only on condition that its removal would not weaken the ICRC’s authority.36

The ICRC’s right of initiative is expressly provided for in the Statutes of the International Red Cross and Red Crescent Movement, revised by the Eighteenth International Conference (Toronto, 1952) and the Twenty-fifth
International Conference (Geneva, 1986). Article 5, paragraph 3, stipulates that:

The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.37

Furthermore, the reference to the Committee’s right of humanitarian initiative, which first appeared in its Statutes in 1930, has been maintained in all subsequent revisions. Thus, Article 4 of the ICRC’s Statutes of 21 June 1973, revised in 1977, 1982, 1988 and 1991, after describing the specific duties of the ICRC, states:

The ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.38

Thus the Committee’s right of humanitarian initiative is firmly rooted in both current conventional law and in the statutory rules of the Red Cross.

This being said, three questions remain to be answered: what are the formal sources of the right of initiative, what are its contents and what are its limits? Lastly, consideration should be given to the reasons for granting the ICRC such a right, in order to understand more fully its significance and scope.

Let us begin with the sources of the right of initiative. In view of the many provisions in the Conventions and its mention in the Statutes of the Movement, it might well be supposed that it is founded in those texts. However, this is not the complete answer, as reference to the discussions of the 1929 Diplomatic Conference will show.

Article 88 of the Prisoners-of-War Code states: ‘The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may perform …’39

The negative form used in the 1929 Convention – and repeated almost word for word in the 1949 versions – leaves not the slightest doubt: the Convention was not granting the ICRC any new rights, but only confirming a competence it already enjoyed.

This conclusion is corroborated by the preparatory work40 and by the closing address given on 24 July 1929 by the chairman of the commission which had drawn up the Code:

... we have succeeded in taking account of both the need to define and strengthen the position of the Protecting Powers and the equally important need not to diminish the field of action of the International Committee of the Red Cross.41

The same conclusions can be drawn with regard to the mention of the right of humanitarian initiative in Article 3 of the 1949 Conventions. In its report to the Joint Committee of the Diplomatic Conference, the special committee responsible for studying the question of the protection of victims of non-
international conflicts stated on three occasions that ‘the right of initiative of the International Committee of the Red Cross or any other impartial humanitarian body was safeguarded’. Obviously, it is not possible to safeguard something that does not already exist. This proves that the Conference was merely upholding a right that the Committee had already acquired by virtue of its past practice and which it had made considerable use of during the Russian and Spanish civil wars and the conflict in Upper Silesia.

Whether relating to international or non-international armed conflicts, the mention of the right of initiative in the Geneva Conventions had but one purpose: to confirm a prerogative which the Committee already possessed and which was founded in customary law. This prerogative stems from the many proposals made by the ICRC on its own initiative, and from the governments’ response to these proposals. In fact, it is true to say that while governments often questioned the suitability of an initiative, there have been hardly any cases where a government contested the ICRC’s right to submit proposals for the benefit of war victims. The ICRC’s initiatives have concerned every state in the international community: governments to which the Committee’s proposals were directly addressed, either as belligerents or as neutrals which had agreed to accept military internees or civilian refugees, and countries that were called on to support the ICRC’s initiatives by providing financial backing or relief goods or by granting exemptions or other facilities for the transit of people, mail or goods. The Committee’s right of initiative is therefore part of customary law. It is maintained and confirmed in current treaty law and in the Statutes of the Red Cross.

The importance of this conclusion is far more than theoretical. It has three major consequences:

a) As part of customary law, the right of humanitarian initiative is not restricted to the field of application of the Geneva Conventions. Consequently, even before the adoption of Article 3 common to the 1949 Conventions, the right of initiative entitled the ICRC to make proposals with a view to relieving the suffering of victims of internal conflicts, as it did in Russia, in Upper Silesia and in Spain. Similarly, the ICRC may today use the right of initiative to propose measures to protect and assist the victims of internal disturbances and tensions, even though these situations are not covered by the Conventions.

b) As part of customary law, the right of initiative is not confined to persons protected by the Geneva Conventions. This enabled the ICRC, during both world wars, to make proposals for the benefit of civilian victims, in particular internees.

c) As part of customary law, the right of initiative allows the ICRC to make proposals to states that are not – or not yet – party to the Geneva Conventions, for instance to the Soviet Union during the Second World War. Although the USSR was not party to the Prisoners-of-War Code, it agreed to consider the proposals made by the ICRC and enter into negotiations with it. For a long time there were hopes of a successful outcome.
Is it possible to determine the content of the right of humanitarian initiative? At first sight, it might seem to have no specific content – indeed, such a right should by its very nature be free of any rigid definition.

Yet the ICRC’s freedom of interpretation is not as wide as might appear.

In the first place, it is a right of humanitarian initiative. Any action envisaged within its scope must therefore be directed towards a humanitarian end: that is, it must be concerned with ‘the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit’.46

Secondly, it is clear from common Article 9/9/9/10 and Article 3 that the right of initiative is granted to the ICRC as an impartial humanitarian organization. This provision means that the ICRC, when exercising that right, has the duty to observe impartiality vis-à-vis the parties concerned, a duty which requires it to make its services equally available to all belligerents.

And finally, if it is accepted that the right of initiative is founded in the ICRC’s own practice, it must also be accepted that that very practice in turn imposes its own obligations on the ICRC, requiring it in particular to remain true to its own tradition and respect the principles that have guided its work since its foundation.

The right of initiative is also subject to a strict limitation: the consent of the parties to the conflict concerned. This ensures that national sovereignty is fully respected.

Yet make no mistake: while this provision limits the ICRC’s power to carry out the activities it has in mind, it does not restrict its right to propose a course of action. The parties’ consent is required to implement proposals, not to make them; that right is fully reserved. Both state practice and the relevant treaty provisions make this absolutely clear.47

Because of the limits imposed by the obligation to obtain the consent of the parties concerned, the right of humanitarian initiative is really a right of proposal, for if one has the right to take some course of action only with the permission of the state, it means that one has the right only to propose that course of action.48 There could be two possible outcomes to any ICRC proposal: rejection, in which case things remain as they are, with the government concerned taking responsibility for the consequences, or acceptance, with the agreement between the ICRC and the party concerned becoming the legal basis for the proposed activity.

In such circumstances, the practical benefit of a right which is so narrowly restricted might well seem questionable. Indeed, any institution or individual may submit proposals to the authorities of their own or another country. If the consent of the warring parties concerned must be obtained in any case, what is so special about the right of humanitarian initiative? Does it have any value at all?

It certainly does. Although restricted by the need to obtain the consent of the authorities concerned, the right of initiative remains vitally important on three counts.
First, the International Committee works in highly volatile situations. Armed conflict can create such tensions that any proposal may be viewed with suspicion, especially in cases of internal conflict; a government faced with an uprising might well regard any offer of services as interference in what it considers to be its internal affairs. Recognition of the right of humanitarian initiative precludes any misunderstanding: it rules out the possibility for parties to conflict to qualify a proposal by the Committee as an unfriendly act.49

Secondly, as Yves Sandoz so rightly points out, it follows that in granting the ICRC the right to make proposals, governments have ‘implicitly pledged to examine those proposals and to respond to them with careful consideration; if not, there would be no sense in granting the ICRC this right’.50

Finally, it must be presumed that the states party to the Conventions do indeed intend to honour their obligations and therefore could not lightly dismiss any proposal intended to help them do so.51

In conclusion, it is worth considering why the right of humanitarian initiative has been granted to the ICRC and upheld in treaty law. There are three main reasons.

The first is that, even though the right of initiative is firmly rooted in customary law and endows the ICRC with an authority on whose recognition by every member of the international community it may insist, there are nonetheless good grounds for its being confirmed in the Geneva Conventions. There could be a risk that the Conventions, in granting the Committee certain defined rights, might be interpreted as excluding any others not expressly mentioned, under the principle *expressio unius est exclusio alterius*. By explicitly recognizing the ICRC’s right of humanitarian initiative, the contracting parties have ruled out in advance any interpretation likely to restrict its right of proposal.

Secondly, if one accepts – as I do – that the international community has entrusted the International Committee with a humanitarian mandate that imposes obligations upon it, the right of initiative can be seen as one of the means enabling the Committee to fulfil that mandate. It can then be understood why the Committee has at times referred to its ‘right and duty’ to take the lead in initiating relief activities.52 The expression is somewhat paradoxical, since the fulfilment of a duty would appear to rule out the notions of choice and spontaneous decision implicit in the concept of a right of initiative. The contradiction is more apparent than real, however, if the right of humanitarian initiative is considered as a counterpart to the obligations imposed on the ICRC by its mandate. This interpretation is confirmed by Article 5 of the Statutes of the International Red Cross and Red Crescent Movement adopted by the Twenty-fifth International Conference of the Red Cross (Geneva, 1986), hence also by all states party to the Geneva Conventions, which lists the various tasks entrusted to the International Committee and mentions in particular its duty to endeavour at all times to
ensure the protection of and assistance to the victims of armed conflicts and of their direct results. It is therefore clear that if the international community has granted the ICRC certain rights, in particular a broad right of proposal, it has done so in return for a duty to ensure protection and assistance for the victims of armed conflicts.

Lastly, there is the fact that war is unpredictable. It has its own dynamics, each day inventing new methods and means of combat, each day causing new victims. Inevitably, the diplomats drafting humanitarian law can work only in the light of known situations and of events experienced by the countries they represent. Any codification therefore runs the risk of coming one war too late. Seen thus, the ICRC’s right of initiative has every justification: it allows the Committee to make proposals for the protection and assistance of war victims each time an unforeseen situation arises. This is very appropriately stressed by the Commentary to the First Convention:

No one can foretell what a future war will consist of, under what conditions it will be waged and to what needs it will give rise. It is therefore right that a door should be left open to any initiative or action, however unforeseeable today, which may help effectively in protecting, caring for and aiding the wounded and sick.53

The right of initiative thus forms a kind of humanitarian counterbalance to the dynamics of war. A feeble one, to be sure, since the powers and resources available to any humanitarian organization will never match those of mankind’s war-making potential. But feeble though it is, that response remains in many cases the only hope for mitigating the suffering of war victims.

Notes


2 Article 38, paragraph 1 (b).

3 Permanent Court of International Justice, The case of the S.S. Lotus, Judgment of 7 September 1927, Collection of Judgments, Series A, no. 10, pp. 4–33.

4 ‘The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule’, International Court of Justice, ‘Military and


If this hypothesis were accepted, the provisions of the 1949 Conventions granting the ICRC certain powers in respect of the Central Tracing Agency, visits to places of detention and relief operations would have to be considered as essentially codifying rules which, by 1949, had already become part of customary law.


Third Convention, Articles 30 paragraph 4, 54, paragraph 2, 68, paragraph 2, 70, 74, 75, 77, paragraph 1, 122, paragraph 3, 124.

Third Convention, Article 125; see also Articles 72, paragraph 2, 73, paragraph 3, 74, 75 and Annex III.


It should not seem strange that the Conventions refer only to the humanitarian tasks which they themselves assign to the ICRC (even though this is only partly correct). In fact, it is rare for a treaty to refer to customary law without trying to specify its content and thereby transforming all or part of the customary rule into a treaty rule. Nonetheless, a treaty has to be interpreted in the light of any relevant rules of international law (Vienna Convention on the Law of Treaties, Article 31, paragraph 3(c)).

Third Convention, Article 23, paragraph 3; Fourth Convention, Article 14, paragraph 3.

Third Convention, Article 126, paragraph 4; Fourth Convention, Article 143, paragraph 5.

Third Convention, Article 112 and Annex II, Articles 2 and 8.

Protocol I, Article 5, paragraph 3.

Common Article 10/10/10/10, paragraph 3.

Protocol I, Article 6, paragraph 3.

A far more coherent picture of the ICRC’s duties can be obtained by listing all the legal provisions which grant the ICRC rights or prerogatives, and noting down alongside each one the tasks for whose accomplishment the respective right or prerogative is necessary.


26 Article 5, paragraph 2, of the Statutes of the International Committee of the Red Cross of 10 March 1921, adapted on 12 October 1928 and 28 August 1930, RICR, no. 143, November 1930, pp. 1008–10.


29 The designation of protected persons varies according to the Convention: in the First Geneva Convention, ‘wounded and sick, medical personnel and chaplains’; in the Second Convention, ‘wounded, sick and shipwrecked persons, medical personnel and chaplains’; in the Third Convention, ‘prisoners of war’; in the Fourth Convention, ‘civilian persons’.


34 Article 3, paragraph 2. For the legislative history of this article, see Chapter II-A above, pp. 330–2.


39 Emphasis added.
40 Procès-verbaux de la Sous-Commission II (administrative et sanitaire) de la Commission II de la Conférence diplomatique de 1929 (typewritten), sessions of 13, 15 and 20 July 1929, discussions concerning Article 88 of the Draft Prisoners-of-War Code (Article 79 in the definitive numbering), ICRC Library, ref. no. 341.33/4 d.

41 Actes 1929, p. 559, speech by Scavenius (emphasis added).


43 The most striking exception during the whole period from 1863 to 1945 was Nazi Germany’s long-standing refusal to accept the ICRC’s right to intercede on behalf of civilian prisoners and deportees, in particular the Jews; the Reich had to abandon this position in the autumn of 1944. But in any case the conduct of Nazi Germany towards civilian prisoners (with the exception of civilian internees) sank to such depths of barbarity that no conclusion may be drawn from it in respect of the development of the law, other than to record its total illegality.


47 To avoid any misunderstanding, it must be stressed that the International Committee uses its right of initiative only when it proposes to engage in activities other than those it is expressly authorized to carry out by the Geneva Conventions and Protocol I. If the action proposed is so authorized, the ICRC refers to the relevant articles. Thus, a party to a conflict would have no grounds to use common Article 99/99/10 of the Conventions and Article 81, paragraph 1 in fine of the Protocol to try to prevent the Committee from carrying out tasks it is empowered to accomplish; the consent of the contracting parties regarding these activities has been given in advance by virtue of their adherence to the Conventions and Protocols.

48 See Sandoz, ‘Le droit d’initiative’, p. 361. There are, however, certain situations in which the right of initiative is not simply a right of proposal but also a right of execution. For example, the ICRC is fully entitled to take precautionary measures in peacetime to operate the Central Tracing Agency on a permanent basis or to establish stocks of relief goods. Such measures obviously could not be subject to the consent of the parties to a conflict, as they would be carried out before any hostilities began. In Resolution 11, the 1949 Diplomatic Conference recognized the need for such preparatory measures and their legitimacy (Final Record 1949, vol. I, p. 362). Or an internal conflict might result in such anarchy that there is no longer any form of responsible command capable of validly representing the various factions. On the basis of its right of initiative and Resolution XIV of the Tenth International Conference...
of the Red Cross (see Book I, Chapter IX, Section 5 above, pages 260–2), the ICRC could try to carry out its operations even though the consent of the parties to that conflict could no longer be obtained. The civil war in Lebanon has shown that such a scenario is not inconceivable.

50 Ibid., pp. 361–2.

References

I know of no study covering this question.
CHAPTER IV

RED CROSS LAW

1. Introduction

The International Committee is a Red Cross institution. It takes part in the deliberations of the International Conferences and other statutory bodies of the International Red Cross and Red Crescent Movement of which it is the founder; but it may also be subject to rules laid down by those statutory bodies.1

What is the impact of the rules and resolutions adopted by the Movement’s statutory bodies vis-à-vis the ICRC, the National Societies and their Federation on the one hand, and the states party to the Geneva Conventions on the other? In any study of the formal sources of the rules applicable to the International Committee in current humanitarian law, this question must be examined.

As the Red Cross resulted from a private initiative, one might see ‘Red Cross law’ – meaning all the rules drawn up by the International Red Cross and Red Crescent Movement – as an autonomous legal system having no relevance to international law. But this would be quite wrong.

Indeed, despite the essentially private origins of the Movement’s constituent parts – the National Societies, the ICRC and the Federation – there can be no denying that the deliberations and actions of the International Red Cross are of concern to public international law. Three points should be made:

a) The states party to the Geneva Conventions take part in the Movement’s International Conferences; they are represented by delegates with sufficient powers for them to participate in the debates and to vote in accordance with the instructions of their governments; these delegates therefore legitimately represent the states whose official position they put forward; the participation of government delegates gives the International Conferences an element of public authority which cannot be disregarded by international law.2

b) The Red Cross and Red Crescent institutions are subject to rules of public international law and carry out activities that are governed by the law of nations; because of this, it must be assumed that they possess some measure of international legal personality.

c) The Red Cross and Red Crescent institutions themselves contribute to the formation of international humanitarian law, both by their activities and
by the drafting of legal instruments which are then submitted to diplomatic conferences.

It can therefore be concluded that although the Red Cross and Red Crescent institutions are governed essentially by private law, by virtue of their composition and their statutes, their actions and in particular the proceedings of the International Conferences have a certain relevance to public international law. Consequently, it must be determined what impact the deliberations of the Movement have on its members on the one hand and on the states party to the Geneva Conventions on the other.

Before considering these questions, a reminder of the composition and terms of reference of the statutory bodies of the International Red Cross is in order.

2. The statutory bodies of the International Red Cross and Red Crescent Movement

From the outset, the Red Cross differed from other charitable organizations that flourished during the second half of the nineteenth century in two basic respects: the permanent nature and the international aspirations of the institutions set up on the basis of the resolutions adopted at the Geneva Conference of October 1863.

In order to preserve the bonds of solidarity that united them across national borders, the Red Cross Societies were to meet regularly, as laid down by Article 9 of the 1863 Resolutions:

The Committees and Sections of different countries may meet in international assemblies to communicate the results of their experience and to agree on measures to be taken in the interest of the work.3

The International Committee, as promoter of the Red Cross and guardian of its Fundamental Principles, has always played an active part in such assemblies; the League, as the federation of the National Societies, took part from 1921.

Moreover, from the very start the Red Cross has placed its work in the context of international relations and the law of nations.

To achieve its aims, therefore, the Red Cross needed to associate states with its activities. This was done at two levels: nationally, each central committee was expected to "get in touch with the Government of its country, so that its services may be accepted should the occasion arise";4 while at the international level the states party to the Geneva Convention were invited to take part in the International Conferences of the Red Cross and did so from the very first, which was held in Paris in 1867.

All these factors led to the present composition of the International Conference of the Red Cross and Red Crescent. Under the Statutes adopted
by the Thirteenth Conference (The Hague, 1928), revised by the Eighteenth
(Toronto, 1952) and again by the Twenty-fifth (Geneva, 1986),\(^5\) the
International Conference is made up of the following:

- delegations from duly recognized National Red Cross and Red Crescent
  Societies;
- delegations from the International Committee of the Red Cross and from
  the International Federation of Red Cross and Red Crescent Societies;
- delegations from the states party to the Geneva Conventions.

The International Conference is the Movement’s supreme deliberative
body; as a rule, it meets every four years. The delegations from the National
Societies, the ICRC, the Federation and the states party to the Geneva
Conventions are all entitled to play a full part in the proceedings and the
voting; each delegation has one vote.\(^6\)

From the time of the Second International Conference of the Red Cross
(which met in Berlin in 1869) onwards, National Society delegates were
asked to come with precise instructions and sufficient authority to be able to
exercise their right to vote.\(^7\) Likewise, it has always been acknowledged that
the government delegates are not acting in a personal capacity, but on behalf
of the states whose official position they express through their statements and
ballots.\(^8\)

While the International Red Cross and Red Crescent Movement is essen-
tially a non-governmental international association, the participation of gov-
ernment representatives at the International Conference gives the meeting a
mixed status, both private and public. The composition of the Conference
also affects the impact of its resolutions:

The votes of government representatives transform what was originally a private
matter into a semi-private legal act, of a mixed nature: Conference resolutions
thus impinge on the sphere of public international law because of the status of
those who drafted and approved them, and any obligations they may contain may
be binding on states, to an extent to be determined later.\(^9\)

The Movement’s other statutory bodies are the Council of Delegates and
the Standing Commission.

- The Council of Delegates is made up of representatives of the National
  Societies, the ICRC and the Federation; it must meet at the time of every
  International Conference and may also meet between Conferences.\(^10\) As it
  comprises only representatives of Red Cross and Red Crescent institutions,
  the Council is the forum in which questions directly concerning the
  Movement can be discussed. Moreover, several particularly important
  matters have been given their first airing at the Council of Delegates before
  being submitted to the Conference.\(^11\)
- The Standing Commission of the Red Cross and Red Crescent consists of
  nine members, five elected in a personal capacity by the International
  Conference, two representatives of the ICRC and two of the Federation; as
a rule it meets twice a year. Its duties are essentially of a procedural nature.\textsuperscript{12}

In examining the formal sources of the rules applicable to the International Committee in current humanitarian law, consideration must be given first and foremost to resolutions of the International Conferences. However, before seeking to gauge the legal impact of these resolutions, close attention must be paid to two instruments which, because of their constitutive and fundamental nature, occupy a special place: the Movement’s Statutes and its Fundamental Principles.

3. The Statutes of the International Red Cross and Red Crescent Movement\textsuperscript{13}

\textbf{Origins}

Up to the end of the First World War, the legal structure of the Red Cross was relatively slender, consisting of the resolutions of the founding Conference of October 1863, which the ICRC and the National Societies considered binding, a few resolutions of a regulatory nature adopted by International Conferences of the Red Cross, and a number of tacit rules imposed by the nature and aims of its work. Each International Conference adopted its own rules of procedure, using previous ones as a guide. Thus at the statutory level the International Red Cross was governed by rules that were to a large extent customary.

With the founding of the League of Red Cross Societies arose the question of the Movement’s organization at the international level. During lengthy negotiations, not always very cordial, vain attempts were made to merge the ICRC and the League. Nothing came of this. The ICRC was adamant in preserving its independence, which it believed was essential for its work, while several National Societies insisted on maintaining a federative body which they had a hand in running. Despite its drawbacks, the ‘two-headed’ structure was maintained.

This coexistence of two institutions at the international level necessitated a rational sharing of tasks and responsibilities, as well as a clear demarcation between the position of the ICRC and that of the League within the Movement. The Red Cross as a whole had to adopt a statutory structure designed to safeguard the unity of the Movement and harmonize the activities of the National Societies, the ICRC and the League.

A set of draft statutes, drawn up by Professor Max Huber, then a member of the Committee, and by Colonel Paul Draudt, Vice-President of the League, was adopted by the Thirteenth International Conference of the Red Cross held at The Hague in October 1928.\textsuperscript{14} These statutes were revised by the Eighteenth International Conference which met in Toronto in July and August 1952, but their basic tenor remained unchanged.\textsuperscript{15}
Although for the most part the Statutes of the International Red Cross did no more than confirm the status quo, the delegates meeting in The Hague firmly believed that they had laid the foundations of a veritable international organization by giving the Red Cross statutory bodies with defined powers. Indeed, those statutes stood the test of time, and for more than half a century they provided the framework for the Movement’s development.

However, in April 1982 the League’s Executive Council set up a working group which was asked to ‘undertake a detailed study with a view to revising the Statutes of the International Red Cross’. Although the ICRC was quite satisfied with the statutes then in force, it agreed to take part in this enterprise.

The draft statutes drawn up by the joint ICRC/League working group drew largely on the Toronto revision. The balance between the Movement’s components was not altered, but the powers and tasks of the various bodies were more clearly defined; the price of this was that the statutes became more wordy, as not even the Red Cross was immune from the rampant verbosity endemic among international organizations.

The new Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus at the Twenty-fifth International Conference of the Red Cross, meeting in Geneva in October 1986.

Content

The preamble, which we shall come back to later, recalls the mission and Fundamental Principles of the Movement.

Article 1 gives various definitions; Article 2 is addressed to governments and reminds the states party to the Geneva Conventions that they have undertaken to co-operate with the components of the Movement.

Article 3 defines the role of the National Societies, and the conditions for their recognition are given in Article 4.

Article 5 defines the role of the International Committee, Article 6 that of the Federation. Co-operation between them, and within the Movement, is dealt with in Article 7.

Articles 8 to 11 lay down the definition, composition, functions and procedure of the International Conference; Articles 12 to 15 do the same for the Council of Delegates, and Articles 16 to 19 for the Standing Commission.

Article 20 sets conditions for amending the Statutes; their entry into force (8 November 1986) is given in Article 21.

Article 5 is of direct concern to this study; its wording is as follows:

1. The International Committee, founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by International Conferences of the Red Cross, is an independent humanitarian organization having a status of its own. It co-opts its members from among Swiss citizens.

2. The role of the International Committee, in accordance with its Statutes, is in particular:

a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
b) to recognize any newly established or reconstituted National Society, which fulfils the conditions for recognition set out in Article 4, and to notify other National Societies of such recognition;
c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;
f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in co-operation with the National Societies, the military and civilian medical services and other competent authorities;
g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;
h) to carry out mandates entrusted to it by the International Conference.

3. The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.

4. a) It shall maintain close contact with National Societies. In agreement with them, it shall co-operate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.
   b) In situations foreseen in paragraph 2 d) of this Article and requiring co-ordinated assistance from National Societies of other countries, the International Committee, in co-operation with the National Society of the country or countries concerned, shall co-ordinate such assistance in accordance with the agreements concluded with the League.

5. Within the framework of the present Statutes and subject to the provisions of Articles 3, 6 and 7, the International Committee shall maintain close contact with the League and co-operate with it in matters of common concern.

6. It shall also maintain relations with governmental authorities and any national or international institution whose assistance it considers useful. It will be seen that the Movement’s new Statutes did not give the International Committee any powers that it had not exercised previously. Article 5 can therefore be considered as codifying well-established practice.

**Legal effects**

The constitutive instrument of an organization always has two aspects: a contractual aspect, since it is an agreement between the parties concerned, and a
constitutional aspect, since it provides the framework that enables the organization to function. The binding force of these rules arises directly from the constitutive aspect of the instrument in question: if the rules were not binding on the parties, the organization could not exist:

The constitutive instrument states in a mandatory fashion the rights and obligations of the members and determines the powers of the statutory bodies; its obligatory nature necessarily stems from its constitutive status since, by the will of the parties, it creates an association.21

In the case of the Statutes of the International Red Cross and Red Crescent Movement, however, the diverse nature of the bodies bound by the rules must be taken into account. The legal implications of the Statutes must be examined separately in relation to the Movement’s members on the one hand, and in relation to the states party to the Geneva Conventions on the other.

The ICRC, the National Societies and their Federation all stem from private initiative. There are no particular conditions for an association between organizations of this kind; all that is required is their agreement.22 A relief organization that refused to adhere to the Movement’s Statutes could not be recognized as a Red Cross or Red Crescent institution and could in no circumstances become a member of the Movement.23 Nor could the members of the Movement demand of a new National Society that it abide by conditions that they themselves were not bound to observe.24 The Statutes are binding in all respects on every member of the Movement.

The question becomes more complex in regard to the states party to the Geneva Conventions. The Statutes were not adopted in the usual manner laid down in the law of treaties, but as a resolution – or decision – of an International Conference of the Red Cross. They therefore do not have the status of an international treaty, but this does not detract from their obligatory nature; states, after all, are free to give their assent in any way they see fit. By voting for the Statutes, they contributed to the adoption of a legal instrument enshrining the existence of the International Red Cross and establishing the statutory basis of a Movement with which they are closely linked:

The fact that the Statutes were not adopted as a treaty does not mean that states are not bound by them: governments are free to give their consent in any way they choose. Although the Statutes were not adopted in the form of an international treaty, they nevertheless constitute an international instrument which, by its nature, binds the states.25

Moreover, it would be absurd for states to take part in the establishment of statutory rules imposing obligations on members of the Movement – the ICRC, the Federation and the National Societies – without accepting that the rules are binding on them as well.

In any event, whether or not they were party to the adoption of the Statutes, states that take part in the International Conference recognize the obligatory nature of the statutory rules of the Movement, of which the
Conference is an organ; otherwise their attendance would be about as logical as the presence at a sporting event of a competitor who refused to accept the rules of the competition. The obligatory nature of the Statutes therefore also stems from the principle of estoppel.

These conclusions are confirmed by practice. The fact is that government delegations have never claimed, either in 1928 or later, that the states they represented were not bound by the Statutes. Quite the contrary: in accepting the Movement’s new Statutes, states party to the Geneva Conventions explicitly undertook to co-operate with the Movement’s components in accordance with the Conventions, the Statutes and the resolutions of the International Conference.

We can therefore conclude, along with Richard Perruchoud, that:

By their vote, the states recognized the existence of the International Red Cross .... Consequently, the Statutes apply to them in their entirety, both the provisions defining the authority of the Movement’s statutory bodies and those specifying the functions assigned to the ICRC or the League.

The International Committee is thus entitled to insist on the recognition by states party to the Geneva Conventions of the powers it has been granted by the Movement’s Statutes.

4. The Fundamental Principles of the Red Cross and Red Crescent

Origins

From the very start, the Red Cross was aware of following a number of basic principles dictated by the institution’s aims and by the nature of the activities it proposed to carry out.

To a large extent these principles were expressed in the Resolutions and Recommendations of the 1863 Conference, and in Article 6 of the Geneva Convention of 22 August 1864, which stated: ‘Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for’.

From then on there were countless references to the ‘fundamental principles’ of the Red Cross. In 1869, for instance, the Berlin Conference asked the International Committee to ensure that the principles were upheld and disseminated. New National Societies, in order to be accepted as members of the Movement, had to adhere to the fundamental principles of the Red Cross. The existence of these principles was accepted and their authority recognized.

On the other hand, for almost a century little effort was made to establish a coherent and universally accepted wording for them.

A first attempt was made in 1874, by Gustave Moynier. Noting that the Red Cross Societies were linked by ‘the pledge they had made to conduct
themselves according to certain common rules’, Moynier distinguished four main principles:

- **centralization**, meaning that there could be only one Society in each country; it had to extend its work throughout the national territory;
- **preparedness**, which required each Society to take all necessary measures to be ready to work in the event of war;
- **mutuality**, whereby each Society pledged to help all wounded and sick with equal urgency, whatever their nationality;
- **solidarity**, whereby the Societies undertook to help each other.32

When revising its own statutes after the First World War, the ICRC incorporated therein four ‘fundamental and uniform principles which are at the basis of the Red Cross institution, namely: impartiality, political, religious and economic independence, the universality of the Red Cross and the equality of its members’.33 These principles are mentioned, in almost identical wording, in Article 10 of the ‘Conditions for the recognition of National Red Cross Societies’ approved by the Seventeenth International Conference of the Red Cross (Stockholm, 1948),34 and in Article VI, paragraph 2, of the Statutes of the International Red Cross, revised by the Toronto Conference in 1952.35

This statement of principles could not, however, be considered exhaustive. So even though the existence and binding force of the fundamental principles was universally accepted, they remained largely undefined. The Red Cross constantly claimed to adhere to fundamental norms but appeared unwilling – or unable – to specify their content.

The League’s Board of Governors took up the question after the Second World War. To the four existing principles they added thirteen others, in which the aims of the Red Cross, its fundamental principles and mere rules of procedure were jumbled together.36

The Toronto Conference endorsed this new statement of principles, while stressing that the four original principles remained ‘the corner-stone of the Red Cross’ – a remark that only added to the confusion.37

Since the process of formulating the fundamental principles of the Red Cross had been started, universally acceptable wording had to be found. The Standing Commission decided to set up a joint ICRC-League commission for the purpose. On the basis of the resolutions of past Conferences and the outstanding contribution made by Max Huber and Jean Pictet, the joint commission prepared a draft of seven articles which was sent to all National Societies and approved unanimously by the Council of Delegates, meeting in Prague in 1961.38 The draft was then submitted to the Twentieth International Conference, held in Vienna in 1965, where it was adopted unanimously under the title ‘Proclamation of the Fundamental Principles of the Red Cross’.39

Since then, the Fundamental Principles – which are solemnly read out at the opening ceremony of each International Conference – have been
recognized as the Movement’s basic charter. Their authority has never been questioned.

These principles – whose wording has remained unaltered, save for the replacement of ‘Red Cross’ by ‘International Red Cross and Red Crescent Movement’ – are now incorporated in the Movement’s new Statutes. Their position in the preamble underscores both their authority and their pre-eminence in what may be called ‘Red Cross law’.

**Content**

The Fundamental Principles are duly quoted here in their entirety:

**HUMANITY**

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

**IMPARTIALITY**

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

**NEUTRALITY**

In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

**INDEPENDENCE**

The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

**VOLUNTARY SERVICE**

It is a voluntary relief movement not prompted in any manner by desire for gain.

**UNITY**

There can only be one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.
UNIVERSALITY

The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.41

Legal effects

Consideration must now be given to the legal effects of the Fundamental Principles of the Red Cross and Red Crescent.

The moral authority of the principles is unquestionable, but this does not exempt them from being examined from the legal viewpoint. In looking into the formal sources of the rules governing the ICRC, it is crucial to determine their legal effects.

Once again, a distinction must be made between the position of the Red Cross and Red Crescent institutions on the one hand, and that of the states party to the Geneva Conventions on the other.

The binding force of the principles for the Movement stems from their fundamental character, from their unanimous acceptance as mandatory rules for the Movement’s members and from their place in the set of rules making up ‘Red Cross law’.

Just like the Statutes, the Fundamental Principles form part of the constitutive rules of the Red Cross. In terms of conduct, they perform the same function as the Statutes do at the institutional level: they create a moral cohesion without which the unity of the Movement could not be maintained. Even more than the statutory rules, the principles stand for belief in certain basic ideals which transcend not only national borders but also political, economic, religious, ideological and racial differences; they preserve the bond of solidarity without which the Movement would lose its meaning.

The binding force of the Fundamental Principles is also rooted in tradition. Although their wording is relatively recent, there is no doubt that their proclamation in 1965 was the expression of a conviction that goes back to the very beginnings of the Movement.

Last but not least, the principles are binding on the Red Cross and Red Crescent because they flow quite naturally from the Movement’s essential purpose: take away the principle of humanity, and the Red Cross loses its raison d’être; take away the other principles, and its work is paralysed.

There is no difficulty in proving that the Fundamental Principles are indeed mandatory. The tenth condition for the recognition of new National Societies states that an aspiring Society must ‘respect the Fundamental Principles of the Movement ...’.42 It would be contrary to those very principles, and in particular to that of the equality of National Societies, to impose rules on new Societies that are not binding on existing ones. As for the Federation, it could hardly exempt itself from rules that are binding on all its members. The International Committee, as guardian of the Fundamental Principles, obviously has to abide by them.
There is no doubt, therefore, that the Fundamental Principles proclaimed by the Twentieth International Conference, and reaffirmed by the Twenty-fifth, are mandatory in their entirety for all Red Cross and Red Crescent institutions. They form a set of obligatory rules which the Movement could not renounce without dissolving itself.

The same does not hold true, however, for the states party to the Geneva Conventions. The wording of the 1965 proclamation and that of the preamble to the Statutes makes it quite clear that these are rules directed towards the Red Cross and Red Crescent institutions.

Nevertheless, this does not mean that states are totally unaffected by rules which they themselves approved unanimously. Indeed, as the Fundamental Principles are referred to in treaty law, they may create obligations for states party to the Geneva Conventions. Article 44, paragraph 2, of the First Convention allows National Societies to use the red cross emblem in peacetime when carrying out activities that conform to the principles laid down by International Conferences of the Red Cross. Article 63 of the Fourth Convention states that an occupying power must, save for temporary and exceptional security measures, allow recognized National Societies to ‘pursue their activities in accordance with Red Cross Principles, as defined by the International Red Cross Conferences’. Similarly, Article 81 of Protocol I refers to the Fundamental Principles to define the facilities which parties to a conflict must grant to National Societies and the League; during the drafting of the Protocol, it was made clear that this referred to the principles contained in the 1965 proclamation.

But the states’ obligations go beyond those set out in treaty law. It has to be accepted that they are bound in a more general sense; it would be inconceivable that states should take part in the adoption of rules binding on the Red Cross and Red Crescent institutions without acknowledging that those institutions have to obey the rules in question.

Is it possible to define the scope of this obligation? Any legal obligation can take one of the following three forms: an obligation to act, an obligation to refrain from acting, or an obligation to permit action. In the case of the Fundamental Principles of the Red Cross and Red Crescent, the governments’ obligation is of the third kind. Given the mandatory force of the principles for members of the Movement and their place in ‘Red Cross law’ on the one hand, and the participation of governments in the adoption of the principles on the other, it is obvious that, quite apart from any treaty obligation, the states are bound to allow Red Cross and Red Crescent bodies to act in accordance with the principles and to insist on this right being respected. If this were not the case, government support for the adoption of the principles would be meaningless.

So while the states themselves are not bound to adhere to the Fundamental Principles, they are obliged to allow Red Cross and Red Crescent organizations to do so. The principles may therefore be invoked vis-à-vis states party...
to the Geneva Conventions, and the Movement’s organizations are within their rights to insist on respecting them.

This conclusion is supported by Article 2, paragraph 4, of the Movement’s Statutes, which stipulates: ‘The states shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles’.45

A recent example serves to illustrate the point.

Between 1970 and 1979 Cambodia was ravaged by a ferocious civil war, followed by a reign of terror imposed by fanatical revolutionaries; this regime was toppled in January 1979, leaving the country in an indescribable state of devastation. In the summer of 1979 the ICRC and UNICEF sent two delegates to Cambodia, then called Kampuchea, to meet the new authorities and to lay the groundwork for a relief operation to save the Khmer people from imminent famine. Negotiations with the government of the People’s Republic of Kampuchea had almost been completed when hundreds of thousands of Cambodian refugees fled towards Thailand. The ICRC and UNICEF decided to assist them by distributing relief supplies not only to those who had crossed into Thailand but also to those who had gathered at the border, in areas that the Phnom Penh government did not control. The latter considered this to be unacceptable interference in the country’s internal affairs and threatened to expel the joint ICRC-UNICEF mission unless it stopped the border operation immediately.46 The two organizations were faced with a dilemma: either they ignored the pressing need to help people at the border, or they accepted the risk of a breakdown in relations with the Phnom Penh authorities, who exercised de facto control over most of the country and most of the population.

The International Committee assessed the problem primarily from the point of view of the Red Cross principles. On the basis of the principles of humanity and impartiality, it came to the following conclusions:

a) It had not only the right but also the duty to bring protection and assistance to all victims of the conflict.

b) The principle of impartiality obliged it to offer its services to every authority which exercised de facto control over the victims.

c) No government was entitled to demand that the ICRC violate the Fundamental Principles of the Red Cross.

The Executive Director of UNICEF, having regard essentially to the principle of non-discrimination, came to the same conclusions.

Delegates of the joint mission were instructed to explain this position to the Kampuchean authorities. While maintaining its opposition to the relief operations carried out from Thai territory, the Phnom Penh government agreed to pursue its co-operation with the ICRC and UNICEF, thereby implicitly acknowledging the ICRC’s right to continue an operation consistent with the Red Cross principles.47 Once this political obstacle had been overcome, the two organizations began what was to become one of the largest relief operations since the end of the Second World War.48
This example is a good illustration of the legal weight of the Fundamental Principles of the Red Cross and Red Crescent: the principles are obligatory for the Movement; they can be invoked vis-à-vis the states party to the Geneva Conventions in that these states must agree to the Red Cross and Red Crescent institutions’ observance of them.

In its judgment of 27 June 1986 in the case of military and paramilitary activities in and against Nicaragua, the International Court of Justice acknowledged without any ambiguity that the Fundamental Principles of the Red Cross had to be respected by states. Examining the lawfulness of the ‘humanitarian assistance’ supplied by the United States government to the counter-revolutionary forces (Contras) opposing the government of Nicaragua, with reference to the principle of non-interference in the internal affairs of a state, the Court unhesitatingly observed that the provision of strictly humanitarian assistance to persons or forces in another country could in no way be considered illicit, provided that such assistance conformed to the Fundamental Principles of the Red Cross, in particular those of humanity and impartiality:

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need. 49

The International Court of Justice thus clearly recognized the binding force of the Fundamental Red Cross Principles; not only do they oblige states to allow Red Cross and Red Crescent bodies to abide by them, but they are also a source of obligations for states themselves, if the latter claim to be engaged in humanitarian activity.

Finally, government delegations attending International Conferences of the Red Cross must respect the Movement’s Fundamental Principles in the same way as all the other delegations. Article 11, paragraph 4, of the Movement’s Statutes states: ‘All participants in the International Conference shall respect the Fundamental Principles and all documents presented shall conform with these Principles’.50

5. The resolutions of the International Conferences of the Red Cross and Red Crescent51

We can now return to the question which was put at the beginning of this chapter: what are the legal effects of resolutions of International Conferences of the Red Cross, for the Red Cross and Red Crescent institutions on the one hand, and for states party to the Geneva Conventions on the other?
Few questions have so divided legal opinion since the end of the Second World War as that of the legal impact of resolutions passed by international organizations. Some schools of thought have endeavoured to prove the mandatory nature of such resolutions, and others the absence of any legal effects.

In these terms, the question seems poorly phrased. Instead of asking whether or not the resolutions have any binding force, it would appear preferable to look at the matter from another angle and break it down into two aspects:

a) What are the conditions to be met for a resolution to be binding on the members of an organization?
b) If a resolution is not binding, can it still have any legal effects, and, if so, which?

The theory of international organizations provides an answer to the first question: two conditions must be met for a resolution to be obligatory. First, the body adopting it must be competent to lay down rules that are binding on those whom they address; secondly, that body must intend to lay down such rules.

Generally speaking, the intentions of the body adopting the resolution are sufficiently clear from the wording of the text; in case of doubt, the preparatory work will make its authors’ wishes clear. This is a matter of interpretation.

With regard to the competence of such bodies, two factors must be taken into account. In the first place, an organization may adopt resolutions that are binding on its members in so far as it is competent to do so; the limits of such competence vary according to the aims of the organization, its structure and the degree of integration its members intend to achieve; as a rule, examination of the organization’s founding charter will reveal the scope of its powers, in particular its power to take decisions binding on its members. The fact that the Statutes of the International Red Cross and Red Crescent Movement were adopted as a resolution and not as a treaty does not alter the legal situation, once it has been established that the Statutes are binding both on members of the Movement and on states party to the Geneva Conventions.

Apart from the powers which are explicitly assigned to an organization by its founding charter, it is generally accepted that every organization enjoys other powers necessary for the achievement of its aims. These are implicit powers not specifically mentioned in its charter; in each case, it must be proved that such implicit powers are necessary for the pursuit of the organization’s objectives.

The theory of implicit powers serves as a guide in the interpretation of an organization’s founding charter. In case of doubt, treaty obligations are generally given a restrictive reading, while the founding charter can be interpreted more broadly; the principle of effectiveness prevails over other rules of interpretation.
This theory also applies to the internal rules of an organization. No organization could achieve its aims if it did not have the power to lay down rules necessary for it to function, for instance in areas such as the admission of new members, the election of decision-making bodies, the procedure for ensuring that those bodies express the common will of the organization’s membership as a whole, and the establishment of subsidiary bodies. In every aspect of its internal regulation, any organization is empowered to supplement the rules laid down in its founding charter. The binding force of those rules on the membership stems from their status as internal regulations, from their relationship to the constitutive rules which are thereby supplemented and clarified, and from the need to ensure that the organization can function properly so as to achieve its aims.54

These considerations apply to the International Red Cross and Red Crescent Movement as well as to any other organization. To determine the binding force of the resolutions of International Conferences, therefore, we must examine both the powers given to the Conference by the Movement’s Statutes and those which may be regarded as implicit.

It has to be said, however, that the Statutes are not entirely clear about the powers of the International Conference.

Under the terms of Article 10, paragraph 5, ‘... the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions’. The Conference alone has the authority to amend the Movement’s Statutes and Rules of Procedure, to give a final ruling on any difference of opinion over the interpretation and application of the Statutes and Rules, and to settle any question referred to it by the International Committee or the Federation in the event of disagreement. The Conference contributes to the unity of the Movement and to the pursuit of its mission in full compliance with the Fundamental Principles; it contributes to respect for and development of international humanitarian law; it may assign mandates to the International Committee or the Federation, within the limits of their respective statutes and those of the Movement; but it has no power to amend their statutes or to take any decision that runs counter to them.55

The preparatory work offers few clues. Indeed, while it was agreed that the Conference might have to take decisions that were binding on members of the International Red Cross, it was also stressed that the adoption of the Movement’s Statutes would in no way jeopardize the independence enjoyed by the Red Cross institutions.56

Although they are not absolutely clear, the Statutes still allow certain conclusions to be drawn, particularly when they are analysed with reference to the theory of international organizations.

Among the texts which must be considered as mandatory are resolutions concerning internal regulations, such as the Rules of Procedure of the International Red Cross and Red Crescent Movement, resolutions concerning the establishment of subsidiary bodies and the rules governing the various Funds and Medals.57
It must also be accepted that the Conference is empowered to lay down binding rules that are essential to maintaining ‘the unity of the Movement and the achievement of its mission in full compliance with the Fundamental Principles’. These would include, for example, the Principles and Rules for Red Cross Disaster Relief.\(^{58}\)

Furthermore, Article 10, paragraph 6, of the Statutes allows the Conference to assign mandates to the International Committee and to the Federation; Article 5, paragraph 2(h), states that the ICRC shall carry out mandates entrusted to it by the International Conference.

Therefore it must be assumed that the resolutions whereby the Conference assigns mandates to the ICRC are binding on the Committee. However, Article 5, paragraph 1, of the Statutes defines the ICRC as an independent organization; is there not, then, a risk that in assigning mandates to the ICRC the Conference might be violating the Committee’s independence? There is no such risk: a mandate is a contractual arrangement whereby the agent undertakes to act on behalf of the principal. For the mandate to be valid, the Committee has to give its consent, either by proposing the mandate itself, by agreeing to it in the course of discussions or by voting for it. When these conditions are met, the mandate is then binding on the ICRC.\(^{59}\)

It thus appears that the International Conference’s power to lay down binding rules depends on the body directly addressed by those rules: the power is greater with regard to the Red Cross and Red Crescent institutions than to states; and it is greater with regard to the ICRC and the Federation than to the National Societies.

However, it should be noted that a resolution that is binding only on certain entities may create indirect obligations for others. For example, it would be inconceivable for the Conference to assign a mandate to the ICRC or the Federation without states and National Societies (which took part in the decision to assign that mandate) being obliged, at the very least, not to obstruct its execution. A resolution binding on certain members of the Conference is thus likely to create concomitant obligations – of a different sort – for other members.

The competence of the International Conference to adopt resolutions binding on its members is nonetheless very restricted. The vast majority of resolutions do not lay down mandatory rules, but recommend a certain course of action for members of the Movement or for states. The resolutions may deal with any matter of concern to the Movement, such as health and social welfare, disaster relief, protection and assistance in the event of armed conflict, the development of humanitarian law, and Red Cross action for peace.

These resolutions are essentially recommendations or exhortations. But it would be quite wrong to see them as having no legal significance.

Any resolution by an international body is the expression of a certain convergence of opinion or common will. It may also reflect a legal conviction,
whose authority must be judged in each case on its merits, taking account of
the text itself and the degree of unanimity in its adoption.

Moreover, a resolution which is not in itself binding may still have a
certain legal impact if it is linked to another source of law. Thus, a resolution
referring to a continuous and uniform practice may, although not having
legal force itself, provide evidence of a legal conviction which in turn suggests
the existence of a customary rule. Similarly, a resolution of an International
Conference of the Red Cross may help in interpreting a treaty provision,
notably a provision of the Geneva Conventions or their Additional Protocols.

It must also be accepted, in a more general sense, that a resolution adopted
by an international body always carries an element of compulsion in respect
of the members thereof. Judge Lauterpacht has stated that a resolution of the
United Nations General Assembly, recommending a certain course of action
to member states, ‘creates some legal obligation which, however rudimen-
tary, elastic and imperfect, is nevertheless a legal obligation and constitutes a
measure of supervision. The state in question, while not bound to accept the
recommendation, is bound to give it due consideration in good faith’.60

Government participation in the adoption of resolutions of International
Conferences of the Red Cross has a lesser impact than in the adoption of
United Nations resolutions because, for the former, the governments are
not alone in voting. However, this does not fundamentally alter the con-
clusion: there is here a question of good faith, of a threshold below which the
participation of states at the International Conference would have no
meaning.

* *

Among the resolutions urging belligerents to adopt a certain line of conduct,
particular mention should be made of those that apply to non-international
armed conflicts.

Because of the rudimentary nature of the legal rules applicable to internal
conflicts, it is hardly surprising that the Red Cross should try to supplement
them, either by resolutions dealing specifically with internal strife, or by reso-
lutions that apply equally to international and internal conflicts.61

There then arises the question of the binding force of these resolutions on
the parties to a conflict, and in particular on an insurgent movement. It
cannot be claimed a priori that they are fully binding on insurgents who took
no part in their adoption. But, if adopted unanimously, such resolutions
should be taken as the expression of a legal conviction held by the interna-
tional community and the Red Cross. As such, they carry a certain degree of
legal authority which an insurgent movement seeking some form of interna-
tional recognition could hardly ignore. At the very least, such a group would
be expected to consider the resolutions in good faith.

* *
Whether they are intended to impose mandatory rules on those to whom they are addressed, or are essentially in the nature of recommendations, the resolutions of International Conferences of the Red Cross have an undeniable impact on international law. The weight of that impact has to be measured in each case. It must be accepted that ‘Red Cross law’, while retaining its separate identity, is too closely linked to the law of nations for it to have no bearing on the latter.

These conclusions are supported by the practice of the International Committee and by that of states in their relations with it. Throughout its history the ICRC has relied on resolutions of International Conferences for support, in particular those which have granted it mandates or acknowledged its authority in particular fields.62

Notes

1 To conform to current usage, the expressions ‘constituent parts’, ‘components’ and ‘constituent members’ are used to denote the member institutions of the International Red Cross and Red Crescent Movement, which are the National Red Cross or Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies; the term ‘statutory bodies’ is used for the Movement’s collective organs, i.e. the International Conference, the Council of Delegates and the Standing Commission of the Red Cross and Red Crescent. Although the states party to the Geneva Conventions also take part in International Conferences, they are not members of the Movement, as is made clear in Article 2 of the Movement’s Statutes (see International Review of the Red Cross (IRRC), no. 256, January–February 1987, p. 29; Handbook of the International Red Cross and Red Crescent Movement, 13th edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, p. 419). In accordance with a century-old custom, the term ‘International Red Cross’ – or, more simply, ‘Red Cross’ – is used to mean the entire Movement where such use creates no confusion.


4 Article 3, Handbook of the International Red Cross and Red Crescent Movement, p. 613.


6 Articles 8 to 11.


9 Ibid., p. 48.

10 Articles 12–15 of the Statutes of the International Red Cross and Red Crescent Movement.


12 Articles 16–19 of the Movement’s Statutes.

14 The draft was adopted unanimously, with five abstentions; four National Societies expressed reservations over one of the articles. Treizième Conférence internationale de la Croix-Rouge, Compte rendu, pp. 12–19, 48–75, 85, 101–14, 117–18 and 182–6.

15 The Toronto Conference adopted the revised statutes by 70 votes to 17. The government and National Society delegations from the Socialist countries voted against the revision to mark their opposition to the fact that the new statutes formally acknowledged the ICRC’s possession of duties and rights which, these delegations believed, only an international organization could have. XVIIIth International Red Cross Conference, Proceedings, pp. 33–9, 96–101 and 161–4.


20 Ibid., pp. 32–4; Handbook of the International Red Cross and Red Crescent Movement, pp. 422–3.

21 Perruchoud, Les résolutions, p. 106.

22 Ibid.

23 Article 4, point 9, of the Movement’s Statutes – IRRC, no. 256, January–February 1987, p. 34.

24 This would be contrary to the precept of the equality of the National Societies, an element of the Movement’s Fundamental Principle of universality – ibid., p. 28.


26 Perruchoud, Les résolutions, p. 108.
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27 ‘The states Parties to the Geneva Conventions cooperate with the components of the Movement in accordance with these Conventions, the present Statutes and the resolutions of the International Conference’ – Article 2, paragraph 1, of the Statutes, IRRC, no. 256, January-February 1987, p. 29.
28 Perruchoud, Les résolutions, p. 108.
30 Compte rendu, 1869, pp. 80–4, 264.
33 ‘Statuts du Comité international de la Croix-Rouge, 10 mars 1921, Article 3’, RICR, no. 28, April 1921, pp. 379–80.
37 XVIIIth International Red Cross Conference, Toronto, July-August 1952, Proceedings, pp. 112–13 and 148 (Resolution 10).
38 Council of Delegates of the International Red Cross, Verbatim Report, Prague, 1961, p. 46.
41 Ibid.
42 Article 4, point 10, of the Statutes of the International Red Cross and Red Crescent Movement, ibid., p. 32.
43 Article 91, paragraphs 2 and 3, of Protocol I.
47 Record of a meeting with Mr Hun Sen, Foreign Minister of the People’s Republic of Kampuchea, 14 October 1979, ICRC Archives, file 280 (180).


56 *Treizième Conférence internationale de la Croix-Rouge, Compte rendu*, p. 104.


58 *Ibid.*, pp. 231–3. The Principles and Rules for Red Cross Disaster Relief were adopted by the XXIst International Conference (Istanbul, 1969) and amended by the XXIIInd (Teheran, 1973), the XXIIIrd (Bucharest, 1977), the XXIVth (Manila, 1981) and the Twenty-fifth International Conference (Geneva, 1986). They appear in the *Handbook of the International Red Cross and Red Crescent Movement*, pp. 569–76.


61 A list of resolutions passed by International Conferences of the Red Cross and applicable to non-international armed conflicts is annexed to the present chapter (see page 386).

62 In this respect, particular reference should be made to Resolution IV/3 of the Berlin Conference (1869) concerning the creation of an international relief and information agency; Resolution VI of the Washington Conference (1912) concerning assistance to prisoners of war, and Resolution XIV of the Geneva Conference (1921) concerning the work of the Red Cross in the event of civil war.

References

The Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross meeting in Geneva in October 1986, are published in the *International Review of the Red Cross (IRRC)*, no. 256, January–February 1987, pp. 25–59 and in the *Handbook of the International Red Cross and Red Crescent Movement*, thirteenth edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, Geneva, pp. 415–47. For other statutory texts and regulations of the Movement, see the *Handbook*, pp. 448–610. Reference may also be made to the official documents and reports of the International Conferences of the Red Cross,
ANNEX: RESOLUTIONS OF INTERNATIONAL RED CROSS CONFERENCES APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS

Tenth Conference (Geneva, March–April 1921) Conference report
Res. XIV Civil war pp. 217–18

Sixteenth Conference (London, June 1938)
Res. IX Protection of civilians against air raids p. 103
Res. XIV Role and activity of the Red Cross in time of civil war p. 104

Seventeenth Conference (Stockholm, August 1948)
Res. XX Persons prosecuted or detained for political reasons p. 93
Res. XXIV Non-directed weapons p. 94
Res. XXV Extension of the activities of the National Societies to all victims of the war p. 94
Res. XL Facilities to be granted by governments to National Societies and to the International Red Cross organizations in matters of relief p. 97
Res. XLIV Repatriation of Greek children p. 98

Eighteenth Conference (Toronto, July–August 1952)
Res. XII Co-operation between National Societies and governments p. 149
Res. XVI Application of Geneva Conventions of 1949 p. 150
Res. XVII Geneva Protocol of 17 June 1925 p. 150
Res. XVIII Atomic weapons p. 150
Res. XIX Alleged violations of the Geneva Conventions pp. 150–1
Res. XX Release of detained persons p. 151

Nineteenth Conference (New Delhi, October–November 1957)
Res. XI Algerian refugees p. 153
Res. XIV Role of National Red Cross Societies in the sphere of civilian protection p. 154
Res. XVII Medical care pp. 154–5
Res. XVIII Protection of populations p. 155
Res. XIX Relief in the event of internal disturbances p. 155
Res. XX Reunion of dispersed families p. 155

Centenary Congress (Geneva, September 1963)
Res. IX Protection of victims of non-international conflicts p. 108

Twentieth Conference (Vienna, October 1965)
Res. XIX Reunion of dispersed families p. 105
Res. XXIII Tracing of burial places pp. 106–7
Res. XXVIII Protection of civilian populations against the dangers of indiscriminate warfare pp. 108–9
Res. XXX Protection of civil medical and nursing personnel pp. 109–10
Res. XXXI Protection of victims of non-international conflicts p. 110
Res. XXXIV Red Cross contribution to civil defence p. 111

Twenty-first Conference (Istanbul, September 1969)
Res. XIV Weapons of mass destruction p. 99
Res. XVI Protection of civilian medical and nursing personnel p. 100
Res. XVII Protection of victims of non-international armed conflicts p. 100
Res. XVIII Status of combatants in non-international armed conflicts p. 100
Res. XXVI Declaration of principles for international humanitarian relief to the civilian population in disaster situations p. 107

Twenty-second Conference (Teheran, November 1973)
Res. I Activities of the International Committee of the Red Cross p. 116
Res. V The missing and dead in armed conflicts p. 118
Res. VIII Relief actions p. 119
Res. XIV Prohibition or restriction of use of certain weapons p. 123

Twenty-third Conference (Bucharest, October 1977)
Res. VIII Taking of hostages p. 138
Res. XII  Weapons of mass destruction  p. 139
Res. XIV  Torture  p. 140

**Twenty-fourth Conference (Manila, November 1981)**

Res. I  Wearing of identity discs  p. 149
Res. II  Forced or involuntary disappearances  pp. 149–50
Res. IV  Humanitarian activities of the International Committee of the Red Cross for the benefit of victims of armed conflicts  pp. 150–1
Res. VI  Respect for international humanitarian law and for humanitarian principles and support for the activities of the International Committee of the Red Cross  p. 151
Res. XIII  Disarmament, weapons of mass destruction and respect for non-combatants  p. 155
Res. XIV  Torture  pp. 155–6
Res. XXI  International Red Cross aid to refugees  pp. 159–60

**Twenty-fifth Conference (Geneva, October 1986)**

Res. I  Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions  p. 151
Res. VIII  Protection of the civilian population in armed conflicts  p. 155
Res. IX  Protection of children in armed conflicts  pp. 155–6
Res. X  Torture  p. 156
Res. XIII  Obtaining and transmitting personal data as a means of protection and of preventing disappearances  p. 157
Res. XV  Co-operation between National Red Cross and Red Crescent Societies and governments in the reuniting of dispersed families  pp. 157–8
Res. XVI  The role of the Central Tracing Agency and National Societies in tracing activities and the reuniting of families  p. 158
Res. XVII  The Movement and refugees  pp. 158–9
CHAPTER V

SPECIFIC RULES AND SPECIAL AGREEMENTS

1. Introduction

A review of the formal sources of rules governing the activities of the International Committee cannot be confined to the Geneva Conventions and their Additional Protocols, international customary law and the general rules of the International Red Cross and Red Crescent Movement; the ICRC’s rights and obligations stem not only from general rules applicable to many different situations, but also from specific rules covering particular cases.

These specific rules can have various sources: special agreements, or resolutions adopted in response to particular situations by the Movement’s international conferences or by other international bodies such as the United Nations. The criteria for the validity of resolutions adopted by International Conferences of the Red Cross to cover particular situations, and the effects of such resolutions, are the same as those for resolutions of a general nature and need not be discussed again. As for resolutions passed by other international organizations, their implications for parties to a conflict and for an institution such as the ICRC depend on the charter of the organization in question and on the conditions surrounding their adoption. It is not possible to examine them here.

This chapter will therefore be concerned with rules arising from special agreements. The history of the ICRC is full of agreements reached between a limited number of parties to deal with existing situations and to assign rights and duties to it.

As these agreements can take on various forms, it is worth pointing out their main characteristics.

2. Types of special agreements

The agreements covered here all deal with existing situations, but they differ in their aim, their legal effects and the number and status of the contracting parties.

The agreements can be bilateral or multilateral – an example of the latter is the peace treaty between the Allies and Japan.
The contracting parties may be governments, non-official groups such as liberation movements or insurgent forces, or international organizations. The ICRC has concluded agreements with all three categories – governments, insurgent or liberation movements and international organizations, both universal and regional.

The agreements may also have different purposes: some may simply seek to confirm that the Geneva Conventions apply in a given situation. Others may set out to define the practical measures to be taken to implement a particular provision of the Conventions; this is the aim of a number of accords concerning the repatriation of prisoners of war or interned civilians. Others confer new tasks and powers on the ICRC which go beyond its usual responsibilities. This was the case of the peace treaty between the Allies and Japan, Article 16 of which gave the ICRC a mandate concerning the indemnification of former Allied prisoners of war held by Japan, or the Bonn Agreement of 6 June 1955 on the International Tracing Service, the direction of which is entrusted to the ICRC.

The implications of these special agreements for the ICRC may vary, according to whether or not it is party to them. A distinction therefore has to be made between:

- agreements to which the ICRC is not party; and
- agreements to which the ICRC is party.

This will be discussed in the following two sections.

3. Agreements to which the ICRC is not a party

Generally speaking, agreements between belligerents are the most effective way of solving the countless humanitarian problems created by war. As long as they do not adversely affect the situation of persons protected by the Geneva Conventions, such agreements are entirely lawful; they are moreover expressly provided for by the Conventions themselves, in both internal and international conflicts.

It is not unusual for the contracting parties to want to involve the ICRC in the implementation of such agreements, and to include provisions to this end. This was the case, for example, with the Agreement between Germany and the USSR with regard to the mutual repatriation of prisoners of war and interned civilians, signed at Berlin on 19 April 1920:

Both parties entrust the conduct of negotiations with such states as may be concerned in the passage of convoys to the International Red Cross at Geneva, which body shall also be responsible for the management and safety of the convoys during their passage through the territory of such states. Each of the contracting parties shall conclude a special agreement with the International Red Cross with regard to the expenses arising out of these proceedings.
Here the question arises as to whether agreements to which the ICRC is not party can create rights and obligations for it. To find an answer, a distinction must be drawn between two situations:

a) The ICRC might have been associated with the negotiations leading to the conclusion of an agreement, but without being party to the agreement itself. In this case, it would have had the opportunity of stating the limits to its role in implementing the accord; it is therefore bound by it in so far as it has given its consent. A perfect example of this is the Bonn Agreement of 6 June 1955 concerning the International Tracing Service, since a bilateral agreement between the Chairman of the International Commission, acting on behalf of all the governments that signed the Convention, and the President of the ICRC is annexed to it and lays down the terms and conditions governing participation by the ICRC in its implementation.15

b) But a special agreement might also result from negotiations in which the ICRC took no part. Would the ICRC still be bound to accept the duties conferred on it?

The answer has to be ‘no’, since it is a clearly accepted legal principle that no person can be bound by an agreement to which that person is not party. This principle, an expression of the freedom of contract, applies equally to international and national law, in accordance with the maxim pacta tertiis nec nocent nec prosunt. The few exceptions allowed in international law, which rely on the theory of ‘objective rights’ or ‘objective situations’, do not apply to agreements between a limited number of states acting on their own behalf.16 The International Committee cannot therefore be bound by an agreement to which it has not consented and which, as far as its concerned, remains a res inter alios acta.

These conclusions are endorsed by the ICRC’s own practice, as illustrated by the following two examples:

a) Article 8 of the truce agreement concluded on 9 July 1948 under the auspices of the United Nations Mediator on Palestine provided for the ICRC to supervise the distribution of relief for the civilian population:

Relief to populations of both sides in municipal areas which have suffered severely from the conflict, as in Jerusalem and Jaffa, shall be administered by an International Red Cross Committee [sic] in such a manner as to ensure that reserves of stocks of essential supplies shall not be substantially greater or less at the end of the truce than they were at its beginning.17

The ICRC felt – with some justification – that it was not its role to ensure the food supply for a civilian population which was intermingled with fighting forces. It therefore decided to confine its assistance to transporting supplies for hospitals, whereas UN observers took charge of supervising the other relief operations.18
b) An agreement between the Red Cross Societies of Japan and the People’s Democratic Republic of Korea on the repatriation of Koreans living in Japan was initialled in Geneva on 24 June 1959 and signed in Calcutta on 13 August; the International Committee agreed to provide the help requested of it, but stressed that it would not consider itself bound by any terms of an agreement reached without its participation and would set its own conditions for taking part in the operation. The ICRC sent a mission to Japan to settle the practical measures for its role in implementing the agreement.\textsuperscript{19}

These conclusions are also confirmed by state practice. For example, following the New Delhi Agreement of 28 August 1973 concerning the repatriation of Pakistani prisoners of war held in India, Bengali servicemen and civilians held in Pakistan, and Pakistanis and a ‘substantial number’ of non-Bengalis stranded in Bangladesh, the Pakistan and Bangladesh governments formally requested the International Committee to carry out the tasks assigned to it under Article 9 of the agreement.\textsuperscript{20}

There can be little doubt that once it has given its consent, the ICRC is bound to carry out the mandate assigned to it under an agreement reached without its participation; its obligation is of course limited by the degree of its consent. The agreement then becomes a source of rights and obligations for the ICRC towards the contracting parties, even though the Committee was not party to it.

This being said, the ICRC would hardly refuse to participate in executing an agreement confined to reaffirming the provisions of the Geneva Conventions and concluded in order to address a specific situation.

4. Agreements to which the ICRC is party

In other situations the ICRC might be a contracting party, either in a bilateral agreement with one other principal, or in a multilateral agreement with several other parties.

Emphasis must be placed here on the importance of a particular legal accord which is sometimes referred to as ‘trilateral’, even though the relationships arising from it are ‘V’-shaped rather than triangular. It comes about when two belligerents reach separate agreements with the ICRC in order to resolve some specific humanitarian issue, while refusing any direct contact with each other. In such circumstances, the only means of sealing the understanding reached through the good offices of the ICRC is to establish two separate and symmetrical agreements between the ICRC and each belligerent. Most operations carried out since 1948 between Israel and its opponents to repatriate prisoners of war and interned civilians have been based on agreements of this kind.
Here our analysis must be centred on the legal effects of agreements to which the ICRC is party: can agreements concluded by an organization such as the ICRC create rights and obligations governed by international law?

Thus we come to the question as to the International Committee’s legal personality: does the ICRC possess a degree of international personality and, if so, does it include the capacity to conclude international agreements?

This question is clearly of fundamental importance for the pursuit of this study. However, detailed consideration of it at this point would be out of place in a review of the sources of the ICRC’s rights and obligations.21 Another approach – based on an examination of practice – is more appropriate in tracing the legal effects of agreements concluded by the Committee.

In the course of its activities, the ICRC often concludes agreements with states, insurgent groups, liberation movements or international organizations on the implementation of humanitarian law. Any agreement is governed by the legal order on which it is founded; this order gives the agreement its validity and legal force. Because of its very purpose, namely to implement humanitarian law, an agreement reached between the ICRC and a party to conflict cannot possibly be considered subject to that party’s domestic law. Nor can it be devoid of legal force, since the intention of the contracting parties is obviously to create rights and obligations for those same parties. Such an agreement is therefore clearly governed by international law and is destined to take effect within the international legal system.

The objections can already be heard: it is impossible for agreements concluded by the ICRC to create legally binding rights or obligations, as any disagreements over their interpretation and application cannot be settled by any arbitral or judicial procedure.

This argument must be rejected.

First of all, although the ICRC itself may not be a party in cases before the International Court of Justice, there is nothing to prevent the Committee and its contracting partner from agreeing to refer any differences regarding the application of the accord in question to arbitration. A good example is the headquarters agreement of 28 March 1975 between the ICRC and the government of Cyprus on the status and activities of the ICRC delegation in Cyprus: this stipulated that all disputes concerning the interpretation or application of the agreement which could not be settled by negotiation or other agreed mode of settlement should be referred to a Tribunal consisting of two arbitrators – one named by the ICRC and one by the Cyprus government – and one umpire, to be chosen jointly. If the two parties failed to agree on the choice of the umpire, either party could ask the President of the International Court of Justice to make the appointment. Arbitral awards by the Tribunal were to be considered final.22

The headquarters agreements concluded with Lebanon (1 April 1978), Zaire (19 April 1983), Nigeria (15 June 1988), Tunisia (11 January 1991), Senegal (10 May 1991), Namibia (28 June 1991), Kuwait (29 October 1991) and Switzerland (19 March 1993) include the same provisions.23
Secondly, it is an inescapable fact that many countries refuse to submit to any form of arbitral or jurisdictional procedure. To make the legal force of an international agreement conditional upon third-party adjudication would be tantamount to admitting that legal relations with these states are impossible, which would be absurd. There is no justification for subjecting agreements signed by the ICRC to more demanding conditions than those that apply to treaties between states.

These conclusions are confirmed in practice. While it is true that some governments have used questionable arguments to free themselves from their obligations – which is no specific failing of agreements to which the ICRC is a party, but shows the weakness of international law in general and of the law of war in particular – there is no known case of a belligerent seeking to free itself from pledges made to the ICRC by claiming that the agreement had no legal force.

The disagreements that arose after the exchange of prisoners in the Middle East on 23 and 24 November 1983 illustrate this point.

The operation was based on two agreements concluded separately by the ICRC with Israel on the one hand and with the Palestine Liberation Organization on the other; the accords provided for the simultaneous freeing of six Israeli prisoners held by the PLO and all prisoners held by Israel in southern Lebanon, as well as a hundred Palestinian detainees held in Israel and the occupied territories.

When the operation had ended it came to light that certain prisoners who the ICRC believed should have been freed by the Israeli authorities had not in fact been released. While accepting that an operation of this scale, carried out in such a short time, carried a risk of error, the ICRC declared that it expected ‘the terms of the agreement to be strictly respected.’ For its part, the Israeli government denied that the prisoners in question were among those entitled to be freed, but it did not challenge the binding force of the agreement. Subsequently, in demanding the immediate release of the latter prisoners, the United Nations General Assembly underlined the binding force of the pledges made by Israel, thereby confirming the validity of the agreements concluded by the ICRC.

It is therefore clearly established that within the framework of the tasks assigned to it, the International Committee has the capacity to conclude agreements that are governed by international law. The same conclusion has been reached by the United Nations International Law Commission.

Notes

1 Examples of these are Resolution X of the Twenty-first Conference, Resolution III of the Twenty-second, Resolution X of the Twenty-third and Resolution III of the Twenty-fourth, all relating to the situation in the Middle East, and Resolution IV of the Twenty-fourth Conference, relating to the conflicts in the Western Sahara, the Ogaden and Afghanistan.

3 See Chapter IV, section 5, above, pp. 376–81.

4 Appendix I (pp. 1029–43) gives a list of several special agreements concerning the ICRC.

5 Treaty of Peace with Japan, signed at San Francisco on 8 September 1951. Although it was signed by representatives of forty-eight nations, it is nonetheless, as far as Article 16 is concerned, a ‘special agreement’ in the terms of Geneva law; the text is in United Nations Treaty Series, vol. 136, pp. 45–76.

6 For example, the headquarters agreements concluded since 1972 between the ICRC and various governments to define the status of ICRC delegations.

7 For example, the two agreements concluded by the ICRC with the government of the Spanish Republic and with the Nationalist Junta respectively on 3 and 15 September 1936; the text is given in RICR, no. 213, September 1936, pp. 757–60.


9 For example, the agreement of 14 May 1969 between the ICRC and the European Economic Community regarding donations of food aid, IRRC, no. 127, October 1971, pp. 566–7.

10 Article I of the cease-fire agreement of 7 August 1970 between the United Arab Republic and Israel states: ‘Both sides will abide by the Geneva Convention of 1949 relative to the treatment of prisoners of war, and will accept the assistance of the International Committee of the Red Cross in carrying out their obligations under that Convention’, IRRC, no. 114, September 1970, p. 522.


12 The International Tracing Service was established at Arolsen in Germany ‘for the purpose of tracing missing persons and collecting, classifying, preserving and rendering accessible’ the documents relating to victims of Nazi persecution and deportation during the Second World War. The text of the Agreement constituting an International Commission for the International Tracing Service, signed at Bonn on 6 June 1955, is in United Nations Treaty Series, vol. 219, pp. 79–104.

13 Geneva Conventions, common Article 3, paragraph 3, and common Article 6/6/6/7.

14 The text of the agreement between Germany and the USSR of 19 April 1920 is given in the League of Nations Treaty Series, vol. 2, pp. 64–9, esp. p. 69.


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21 The question of the ICRC's legal personality will be discussed in Book III.

22 Article 12 of the headquarters agreement of 28 March 1975 between the ICRC and the Cyprus government, ICRC Archives, file 250.

23 ICRC Archives, file 250.

24 Press release no. 1478 of 13 December 1983; correspondence with the Israeli government, ICRC Archives, file 210 (175 M.Isr-100).


27 ‘... there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization ... are indeed governed by international law’, Report of the International Law Commission on the Work of its Twenty-Sixth Session, (Question of treaties concluded between states and International Organizations or between two or more International Organizations), Yearbook of the International Law Commission, 1974, vol. II, United Nations, New York, 1975, Document A/CN.4/1974/Add. I (Part 1), pp. 290–9, esp. p. 297. See also Paul Reuter, Introduction to the Law of Treaties, pp. 32–3 and 36. If agreements concluded between the ICRC and international organizations are governed by international law, there is no reason why agreements concluded between the ICRC and governments should not be governed by it.

References

I know of no study covering this question.
CONCLUSIONS

No legal question can be resolved without first determining the rules that apply to it. The preceding review of some of the sets of rules governing the activities of the International Committee of the Red Cross has been carried out with this aim in mind, seeking to identify the legal effects of the rules on the parties to conflicts and on the Committee itself. This review covered the Geneva Conventions and their Additional Protocols, international customary law, ‘Red Cross law’ and special agreements concerning the ICRC.

The intention has not been to establish a complete list of the legal sources applicable to the ICRC; this would have to encompass other sources, which can be mentioned here only in passing, without discussion of their legal relevance to the ICRC. They include:

- international conventions concerning the laws and customs of war, in particular the Hague Conventions of 29 July 1899 and 18 October 1907, as well as the Geneva Protocol of 17 June 1925;
- international conventions on human rights;
- international conventions which, a priori, do not concern the laws of war or human rights, but which nevertheless contain certain provisions relevant to the protection of victims of armed conflicts – for example, the Universal Postal Convention, whose Article 17 deals with exemption from postal charges for mail to prisoners of war and interned civilians;¹
- general principles of law;
- provisions of domestic law which confer powers on the International Committee; for example, the work of the ICRC from 1961 to 1972 to ensure compensation for the victims of pseudo-medical experiments carried out by the Third Reich was based on a decree by the government of the Federal Republic of Germany dated 26 July 1951;²
- some resolutions or decisions of other international bodies; there are, for example, a number of resolutions concerning transport and communications,

Obviously, this summary is far from complete, but it does allow certain conclusions to be drawn.

To begin with, there is the wide diversity of sources for the rules which apply to the ICRC’s activities, and hence the large number of legal instruments which the Committee may invoke in support of its work.

Yet there appears to be a striking lack of doctrinal reflection by the Committee with regard to this diversity. The impression is often given that outside the scope of the Geneva Conventions and their Protocols, the ICRC’s only weapon is its right of humanitarian initiative – whose nature and legal weight are in any case not clearly understood. International custom, in particular, is notable by its absence from the ICRC’s published works; virtually no reference is made to it. Such ostracism is hard to explain.

Even with regard to the Conventions themselves, the Committee too often seems to take refuge behind semantic or literal readings which take no account of state practice – or of its own. In fact, these interpretations frequently fall short of the practice that the Committee itself has developed on the basis of the Conventions.

I therefore believe that the Committee should draw up a thorough and detailed catalogue of all general and specific rules relevant to its work, drawn from every formal source of public international law. There is every reason to believe that such a list would open up new perspectives for the ICRC and enable it to strengthen the foundations of its work.

The Committee should also establish an exhaustive inventory of its own practice. I have no doubt that a list of this kind, covering, in particular, tracing activities, visits to places of detention, relief operations, the repatriation of prisoners and the protection of non-combatants, would show up the extraordinary richness of the ICRC’s tradition; it would create the basis for a more dynamic interpretation of the Geneva Conventions, as befits the organization’s humanitarian mission. Moreover, by highlighting its numerous
precedents, the ICRC would be better able to demonstrate its competence in fields where belligerents too often try to challenge its right to act.

Finally – and perhaps most importantly – there must be a constant awareness that the humanitarian conventions are really no more than the expression of the fundamental humanitarian principles which underlie them. These principles, just as much as any explicit provisions of the law, must serve as the Committee’s guiding light.

Notes

3 The text of the Resolution is in RICR, no. 364, April 1949, pp. 336–8; Annual Report 1949, pp. 22–3.
5 The text appears in IRRC, no. 46, January 1965, p. 29.
6 IRRC, no. 209, March–April 1979, p. 105.
7 Ibid.
8 Ibid.
PART TWO

OFFERS OF SERVICES BY
THE INTERNATIONAL
COMMITTEE OF
THE RED CROSS

No one can guarantee success in war,
but only deserve it.
Winston Churchill,
26 November 1940
INTRODUCTION

Apart from the extremely rare cases where the parties to a conflict request its assistance, any intervention by the International Committee begins with an offer of services. This is basically a notification to the belligerents that the ICRC is at their disposal, during that conflict, to carry out the tasks assigned to it by international humanitarian law.

The ICRC’s ability to assist and protect the conflict victims depends on whether its offer is accepted or rejected. The importance of this subject for the belligerents, for the ICRC and for the victims is therefore obvious.

For greater clarity, each of the following aspects will be considered separately:

- the legal bases for offers of services;
- how they are made;
- their content;
- the addressees of such offers;
- their effects.

They will be dealt with in the next five chapters.

References


Offers of services addressed at the beginning of certain conflicts to belligerents and, where appropriate, to neutral states have been published; for the First World War, see Actes du Comité international de la Croix-Rouge pendant la guerre, 1914–1918, ICRC, Geneva, 1918, pp. 7–12; for the Second World War, see RICR, no. 249, September 1939, pp. 741 ff.; for the war in Korea, see Le Comité international de la Croix-Rouge et le conflit de Corée: Recueil de documents, ICRC, Geneva, 1952, vol. I, pp. 3 ff.; for the war in Vietnam (the appeal of 11 June 1965), see IRRC,
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no. 53, August 1965, pp. 417–18; for the Arab-Israeli war of October 1973, see IRRC, no. 152, November 1973, pp. 583–4. In other conflicts the ICRC has merely mentioned, in the International Review of the Red Cross, that an offer had been made, in some cases giving a summary of its content.
CHAPTER I

THE LEGAL BASES FOR OFFERS OF SERVICES

The offers of services by which the International Committee announces its availability and proposes carrying out the tasks assigned to it under humanitarian law are above all the embodiment of a tradition. They are based on a long line of similar approaches made in earlier wars, and on the acceptance of those offers by the belligerents.

This tradition is confirmed by the Statutes of the International Red Cross and Red Crescent Movement, which stipulate in Article 5, paragraph 2(d) that the role of the International Committee is in particular:

- to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.¹

However, attention will be focused here primarily on the bases provided by treaty law for such offers of services.

A distinction must first be made between international and non-international armed conflicts.

As regards international armed conflicts, the Geneva Conventions contain no specific provision governing offers of services by the ICRC. This should not be considered surprising. The offers of services are not, after all, an end in themselves; they are simply a first step towards the accomplishment of tasks which humanitarian law has entrusted to the Committee, such as the transmission of lists of military and civilian prisoners, the exchange of messages between prisoners and their families, visits to places of detention and relief operations. To identify the legal bases for the ICRC’s offers of services, therefore, the legal provisions governing these activities must be examined, for in assigning tasks and prerogatives to the ICRC, they also give it the authority to make whatever approaches are necessary to enable it to carry out the tasks in question.

This does not mean that the Committee’s offers of services must be confined to activities that are expressly mentioned in the Geneva Conventions. On the contrary, common Article 9/9/10 allows the ICRC to undertake other humanitarian activities, subject to the consent of the parties to the conflict concerned. It could not possibly do so without also being authorized to offer its services to carry them out. Here the ICRC’s right of humanitarian initiative comes into play.

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So in situations of international armed conflict, the ICRC is empowered to offer its services on the basis of all legal provisions which assign rights and duties to it. It may also propose carrying out other humanitarian activities for conflict victims on the basis of its universally recognized right of humanitarian initiative.

In the case of non-international conflicts, the ICRC’s offers of services are based on Article 3, paragraph 2 of the Geneva Conventions: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ This provision applies to all non-international conflicts, including those covered by Protocol II; it has been shown above that in all situations covered by Protocol II, Article 3 also applies.\(^2\)

In situations of internal unrest, the ICRC can base its offers of services on its right of initiative and on Article 5, paragraph 2 of the Movement’s Statutes.

The legal basis for the ICRC’s offers of services, and their legal implications for the parties to a conflict, will therefore depend primarily on the nature of the situation in question and secondly on the activities that are proposed.

This leads to the question as to whether the ICRC has the right to judge for itself whether a situation justifies an offer of services, or whether it must abide by the assessment of the belligerents themselves.

This question is crucial, for the ICRC’s freedom of action hinges upon it. Three factors must be taken into account:

a) First of all, the views of the belligerents are often subjective and almost always at odds: country A claims it is the victim of aggression, while country B says there has merely been a border incident; country C claims to have nothing to do with the conflict, although in fact its troops are actively involved; another country might deny there is any conflict at all, even though the dead and wounded are piling up in their thousands. If there is one area in international relations where fiction reigns supreme, it is that of warfare. Quite obviously, the International Committee cannot possibly be bound by contradictory statements or assessments which are divorced from reality.

Such deception is no less common when it comes to non-international conflicts. The side claiming to be the legitimate government can be seen deploying the full might of its armed forces and assuming powers that would be totally inappropriate except during a conflict, while maintaining that the insurrection it faces is nothing more than banditry, to be dealt with under ordinary criminal law. Out in the hills, meanwhile, the rebel side is donning all the outward attributes of sovereignty and claiming that it, and not its opponent, is the legal authority. Here again, the ICRC is confronted with opposing claims that cancel each other out.

b) Secondly, it must be stressed that the application of humanitarian law is determined not by any formal condition, such as a declaration of war, but
by the fact that a conflict exists. Legal subtleties put forward by the parties to a conflict cannot impede the application of the Geneva Conventions or, consequently, the ICRC’s activities. The execution of the Conventions is not subordinated to the belligerents’ assessment of the conflict: once the established criteria have been met, the Conventions will apply and the ICRC is entitled to offer its services to the parties involved.

c) Third and last, it would be absurd for the international community to have requested the International Committee to carry out certain tasks without also having granted it the power to decide whether and when a given situation calls for the performance of those tasks.

Therefore, the International Committee is not bound by the opinions of the warring parties as to the nature of the conflict. It will take their assessments into account, along with factual criteria, and may accept them or reject them after considering all the circumstances. The ICRC must be free to make an independent determination of the facts which may prompt it to make an offer of services.

It is obvious that its assessment would concern only those matters relating to the protection of victims of war or of similar situations, since this is the limit of the ICRC’s competence.

It must also be clear that this assessment is not binding on the parties to a conflict. Given the decentralized nature of international society, and the principle of national sovereignty, only a body which had been given such authority by the states themselves would be empowered to determine the existence and nature of armed conflicts in a manner binding on the belligerents. Such authority may not be taken for granted.

Nonetheless, the ICRC retains the right to make an independent assessment of the existence of a conflict, for its own purposes, in order to be able to offer its services to the belligerents.

If the International Committee may make an independent assessment of a situation with a view to offering its services, may it also offer its services without having been approached to that effect by the parties concerned?

It undoubtedly can. Since common Article 9/9/9/10 authorizes the ICRC, subject to the parties’ consent, to carry out humanitarian activities other than those specified in the Geneva Conventions, it must also authorize the ICRC to offer its services in order to carry out such additional activities – if not, the article would have no point. As we have seen above, the right of humanitarian initiative is fundamentally a right to put forward proposals.3

It would be inconceivable for the Geneva Conventions to allow the Committee to offer its services spontaneously in order to carry out activities which are not expressly provided for, but not in order to carry out those which are.

Thus the International Committee has the right to offer its services on its own initiative, without having to consult the parties concerned beforehand. This conclusion is confirmed by the ICRC’s consistent practice in offering its services at the opening of hostilities without prior consultations which, given
the kind of situations in which it works, might all too often serve to delay or paralyse all action.

The importance of this conclusion should not be underestimated: whereas other international organizations are obliged to wait – often in vain – for governments to request their help, the ICRC has the right to make the first move and offer its services to the parties to a conflict. This right is both the result, and one of the clearest signs, of the spirit of initiative which the ICRC has so frequently demonstrated.

But then the question should be reversed: is the ICRC obliged to offer its services?

After debating this question privately, the Committee decided that it was not:

The ICRC is mentioned a great many times in the 1949 Conventions. It should be noted that it is generally mentioned by way of an example: ‘A humanitarian body such as the ICRC’. Parties to conflict are in no way bound to call upon it and it is not legally obliged to carry out the various activities mentioned.

The ICRC will not renounce any of these activities; it is ready to undertake them when needed. But this does not mean that it is obliged to perform them as a matter of course. It will determine in each case whether or not to do so.4

Quite frankly, this opinion is not convincing.

To start with, the premise is incorrect. While it is true that the International Committee is often mentioned by way of example in the 1949 Conventions, this is not true of provisions concerning its traditional activities, such as the work of the Central Tracing Agency, visits to places of internment and relief operations; there, the ICRC is mentioned in its own right.5

Moreover, while the Geneva Conventions admittedly do not oblige the ICRC to undertake any activity,6 this is in the very nature of the Conventions, the purpose of which is to create rights and obligations for the contracting states. The fact that they do not impose activities on the ICRC does not imply the absence of any obligation whatsoever.

Other sources of law must also be taken into account.

In view of the ICRC’s long-established practice, there can be little doubt that the Committee has not only the right to carry out the tasks assigned to it by the Geneva Conventions, it also has the duty to do so.

This is confirmed by Article 5, paragraph 2(c) of the Statutes of the International Red Cross and Red Crescent Movement, which stipulates that the role of the International Committee is in particular:

- to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law.7

The wording dispels all doubt: the ICRC is indeed bound to carry out the tasks assigned to it by humanitarian law.

This is moreover the standpoint adopted by the ICRC itself at the 1949 Diplomatic Conference, with regard to internal conflicts.8
It follows that if the Committee has a duty to carry out certain activities, it must also have a duty to offer its services with a view to carrying them out.

Clearly, the ICRC may judge for itself what it considers to be the right moment for the offer to be made, as well as the form it should take – in other words, it has the freedom to interpret the obligation it is under. But this right of interpretation – quite usual within international law – should not be confused with an absence of obligation.

This argument leads to a conclusion radically different from that reached by the Committee: I believe that in any situation of armed conflict, the ICRC is bound to offer its services with a view to carrying out the tasks imposed on it by humanitarian law.

This is perfectly logical: could one imagine the Committee declining to offer its services during an armed conflict in which the Geneva Conventions, or at least Article 3, applied? Its tradition, its consistent practice, the Fundamental Principles of the Red Cross and its own ethos combine to reject the very idea.

Granted that the International Committee is obliged to offer its services to the parties to a conflict, are they then obliged to accept?

This brings us to the question of the legal effects of its offers of services. But before attempting to answer it, consideration must be given to the procedure, the content and the addressees of those offers. Such will be the subject of the following chapters.

Notes

3 See Part I, Chapter III, Section 3, above, pp. 351–8.
5 See the Third Convention, Articles 70, 123, 125, paragraph 3, and 126, paragraph 4; and the Fourth Convention, Articles 106, 137, 140, 142, paragraph 3, and 143, paragraph 5.
6 Exception is made for the appointment of neutral members of the Mixed Medical Commissions (Third Convention, Annex II).
7 IRRC, no. 256, January–February 1987, p. 33; Handbook of the International Red Cross and Red Crescent Movement, p. 422.
8 ‘M. Pilloud ... rappelle qu’en vertu d’un mandat qui lui a été conféré par la Xe Conférence internationale de la Croix-Rouge, le CICR est tenu d’étendre son activité humanitaire aux conflits civils’ (Mr Pilloud ... recalled that by virtue of a mandate conferred on it by the Tenth International Red Cross Conference, the ICRC was bound to extend its humanitarian activities to civil war), Actes de la Conférence diplomatique de Genève de 1949, Département politique fédéral, Berne, 1949, vol. II-B, p. 41 (the English translation given in the Final Record of the Diplomatic Conference is misleading; Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, 1949, vol. II-B, pp. 42–3).
CHAPTER II

PROCEDURE AND TIMING OF OFFERS OF SERVICES

The Geneva Conventions and its own previous practice give the ICRC every freedom in deciding how to make its offers of services. As such an offer is essentially a notification, any means may be used to convey it. It can be made in a letter or telegram, at a meeting either in Geneva or elsewhere with a representative of the country concerned, or by sending a delegate to the country itself. More than one means might be used, since the prime consideration is to inform the parties to a conflict as quickly as possible of the ICRC’s availability.

Of all these, sending a delegate to the country is usually the most effective means. He or she can meet all the officials concerned by the ICRC’s proposed activities, brief them on its intentions and capabilities, and answer their questions. The ICRC is certainly aware, however, of the risks inherent in placing so much responsibility on the shoulders of one person; before setting out, the delegate must be given detailed negotiating instructions.

The timing of the offer is also entirely up to the Committee. As a general rule, offers are made as soon as hostilities begin, or at least as soon as it hears that there are victims, such as casualties, prisoners of war or interned civilians.

But there is nothing to prevent the ICRC from making an offer of services in advance, if a political crisis looks likely to develop into a conflict. In this case, the governments concerned are not bound to accept its offer, but they must bear responsibility for the consequences of their refusal.

There have been three cases, to my knowledge, in which the ICRC decided to offer its services before the outbreak of hostilities:

- **Middle East, 1967:** Concerned by the growing tension in the region, the ICRC made contingency plans and decided, on 25 May, to send delegates to Cairo, Tel Aviv, Damascus, Amman and Beirut. The Committee thus had delegates in the field and ready to take action when war broke out on 5 June.1

- **Cyprus, 1974:** After the coup that ousted President Makarios on 15 July, the ICRC, foreseeing a new outbreak of communal violence, contacted the Cyprus Red Cross Society and made an offer of services to the country’s new authorities, basing it on Article 3. The Committee also dispatched a delegate and a doctor to Nicosia, but as their aircraft was refused permission to land, the ICRC was not present on the island when Turkish forces went ashore near Kyrenia on 20 July. It was not until 23 July, just after a cease-fire had been agreed, that the delegates managed to reach Cyprus.2
Iraq/Kuwait, 1990: The ICRC soon realized that the hostilities resulting from Iraq's invasion of Kuwait on 2 August would spark a much wider conflict between Iraq and a coalition of states led by the United States, Britain, France and Saudi Arabia. It therefore used the months prior to the outbreak of this new war to complete its own preparations, not only mobilizing its own resources and those of the International Red Cross and Red Crescent Movement, but also taking the appropriate steps at diplomatic level. In its numerous contacts with the countries concerned, the Committee reminded them of the provisions of humanitarian law and of their own commitments in that regard, so that when it made formal offers of services to all the belligerents at dawn on 17 January 1991, these were less an announcement of its availability than a confirmation of arrangements already made. When fighting flared, the ICRC was present in Iraq, Saudi Arabia, Jordan, Syria and Iran, even though it was not initially able fully to deploy its staff and logistic resources everywhere.

These three examples – two of them successful, the other not – show both the importance of anticipatory measures and the difficulty in getting the authorities concerned to accept them.

Indeed, because of the speed with which some modern conflicts develop, coupled with the closing of airspace over the war zone, the ICRC often finds it impossible to send personnel to the conflict area once fighting has begun. Only by sending delegates beforehand can it be sure of being represented on the spot in order to carry out its assigned tasks without having to wait until the fighting is over. The importance of prior action cannot be overstated.

On the other hand, the ICRC has to avoid taking an alarmist attitude over each political crisis which might lead to a conflict. It must not give the impression that it has lost all hope for peace.

The quality of relations firmly established in peacetime and the possibility of sending delegates to countries for routine contacts, along with speed and absolute discretion in taking preliminary measures, are often the key to success.

Notes

1 Annual Report 1967, p. 5.
CHAPTER III

THE CONTENT OF OFFERS OF SERVICES

The content of any offer of services by the ICRC will naturally depend on the circumstances: the services proposed will be determined in each case by the victims’ needs, and the content of the offer will vary accordingly.

Such offers do, however, have certain features in common, as an analysis of their content will show.

An offer of services, as stated earlier, is basically a notification by the ICRC to the parties to a conflict of its availability to carry out the tasks assigned to it under humanitarian law. It is therefore primarily an offer to co-operate with them in order to implement the Geneva Conventions and the other humanitarian rules.

In many cases the Committee has from the start specified the activities it wished to carry out (drawing up lists of prisoners, transmitting family messages, visiting prisoner-of-war and civilian internee camps, repatriating seriously wounded or sick military personnel, providing relief supplies, and so on). At other times – especially when it was not adequately informed about the conflict victims’ situation – it has formulated its offer in more general terms, stating that it was ready to co-operate as far as possible with the authorities concerned to ensure the proper application of the Geneva Conventions, but without going into detail about the activities it proposed to undertake.

Either approach is perfectly acceptable, on condition that the principles of neutrality and impartiality are scrupulously respected.

Provided there was no risk of controversy in doing so, the ICRC has preferred to base its offers of services on the relevant provisions of the Geneva Conventions. In international conflicts, it has cited articles which grant it specific powers, such as the provisions relating to the Central Tracing Agency, as well as Articles 126 of the Third Convention and 143 of the Fourth, concerning visits to places of captivity. In non-international conflicts, it has based its offers on Article 3.

On the other hand, where the nature and classification of the conflict might be contested, the ICRC has generally preferred to base its offers of services on the fundamental humanitarian principles and on its universally recognized right of initiative, so as to avoid becoming entangled in legal polemics which threaten to paralyse its work. This approach does not mean, however, that the Committee lacks legal conviction as to the nature of the conflict and the law that should apply.
The point is that the Geneva Conventions and its own established practice allow the Committee great latitude in deciding whether or not to base its offers on the relevant provisions of the law, as well as every freedom in deciding how the offer should be made and the form it should take.

In most cases, the offer of services is the ICRC’s first formal approach to the belligerents when a new conflict breaks out. As such, it is an opportunity for the Committee to remind them of the pledges they have given and the rules they must observe. Here its practice has been consistent: at the start of each new conflict it has drawn the belligerents’ attention to the existence of humanitarian rules and stressed that they must be respected.

The reminder might vary in substance, according to the situation. In some cases, the ICRC has referred to the whole of the Geneva Conventions, while in others mention has been made only of Article 3. Elsewhere, it has spelt out and called for respect for the fundamental humanitarian principles.

The importance of this reminder should not be underestimated. Experience has shown that the conduct of the belligerents during the first few hours or days usually determines whether or not the laws and customs of war will be respected throughout the conflict. The spiral of recriminations and reprisals can be avoided only by insisting on strict compliance with humanitarian law from the moment the first shots are fired. While the application of the Geneva Conventions and of Article 3 does depend solely on certain factual criteria being met, and not on any declaration or statement of intent, it is nonetheless essential, when conflict breaks out, to dispel any uncertainty as to the binding force of the humanitarian rules and the determination of the contending parties to abide by them.

The clearly stated position of a humanitarian organization, whose impartiality is universally acknowledged, is vital in seeking to ensure that the law is observed; indeed, it will in most cases incite the belligerents themselves to confirm their intention to apply the humanitarian rules in the conflict.

But should the Committee stop at simply reminding the belligerents of the legal provisions to which they have subscribed? Should it not also, where appropriate, call on them to supplement these rules for the duration of the conflict with other humanitarian arrangements to alleviate the suffering that will inevitably follow?

The ICRC’s practice on this point is almost as old as the ICRC itself: its first call for wounded and sick members of the armed forces and military medical personnel to be granted the protection of the Geneva Convention, even though Austria and the southern German states were not yet party to it, was made during the Austro-Prussian War of 1866.6

This approach has been consistently maintained. The ICRC has called for the de facto application of the Geneva Conventions or other humanitarian rules whenever non-ratification by one or other party to the conflict has threatened their implementation.
Without dwelling again on the historical examples discussed earlier,7 mention may be made of three particularly significant cases:

a) When the Suez conflict broke out on 29 October 1956, Egypt, France and Israel were party to the 1949 Geneva Conventions; Britain, however, was not. In a telegram dated 31 October, the International Committee urged the British government to ratify the Conventions by accelerated procedure. The Prime Minister replied the next day that his government was not yet empowered to proceed with ratification, but assured the ICRC that Britain accepted the Conventions and had every intention of applying their provisions should the occasion arise.8

This statement, which was communicated immediately to the other belligerents,9 brought the Conventions into effect between Britain and its adversaries, under the terms of common Article 2, paragraph 3:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are party thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

b) Yemen, which had isolated itself from the rest of the world for generations, had taken no part in drawing up humanitarian law and was not bound by the Geneva Conventions when civil war broke out in 1962; the ensuing hostilities devastated the country for several years.

Following a number of preliminary contacts the International Committee decided to send two delegations to the country.

After a tortuous journey, the first of these reached Imam al-Badr’s remote mountain stronghold. The Imam said he would order his troops to respect the basic provisions of the Geneva Conventions, in particular Article 3.

The other delegation met the republican leadership at Sanaa, where President Sallal gave a similar undertaking for his forces. Both pledges were subsequently confirmed in writing.10

So although Yemen was not bound by humanitarian law, the ICRC was able to obtain undertakings from both sides that they would respect the main provisions of the Conventions.

c) Extremely concerned about the alarming reports on the plight of the civilian population in the October 1973 war, the ICRC urged all the belligerents (Egypt, Iraq, Israel and Syria) to apply, on an anticipatory basis, the provisions of Part IV (‘Civilian population’) of the draft Additional Protocol to the 1949 Conventions relating to the protection of victims of international armed conflict, in particular draft Articles 46 (‘Protection of the civilian population’), 47 (‘General protection of civilian objects’) and 50 (‘Precautions in attack’).

Despite some initial misunderstandings, cleared up in subsequent contacts, the proposal was accepted by all belligerents.11
These three examples clearly show that the International Committee is entitled, when the interest of the victims so demands, to call on belligerents to apply more extensive rules for the duration of a particular conflict than those laid down by international customary law and by the international conventions in force between them.

Notes

1 For example, the telegrams from the ICRC to the Foreign Ministers of Egypt, Israel, France and Britain of 2 November 1956, ICRC Archives, file 201 (152).
2 For example, the appeal of 11 June 1965 concerning the conflict in Vietnam. See IRRC, no. 53, August 1965, pp. 417–18.
3 Examples of such offers of services are those made in connection with the Suez conflict, 2 November 1956, ICRC Archives, file 201 (152); the Arab-Israeli War, 5 June 1967, ICRC Archives, file 201 (152); the India-Pakistan conflict of December 1971, 4 December 1971, ICRC Archives, file 201 (66) and 201 (165); and the Iran-Iraq conflict, 23 September 1980, ICRC Archives, file 201 (70) and 201 (71).
4 Examples include the offers made to the government and insurgents in Lebanon during the 1958 civil crisis, RICR, no. 475, July 1958, p. 353 and no. 476, August 1958, pp. 415–16; Annual Report 1958, pp. 12–14; and the offers sent to the Cuban Red Cross on 11 April 1958, RICR, no. 473, May 1958, p. 275.
5 See the appeal concerning the situation in Rhodesia/Zimbabwe, 14 January 1977, IRRC, no. 191, February 1977, pp. 74–5.
7 The ICRC intervened in a similar way during the Franco-Prussian War (1870–1), the war in the Balkans and the Caucasus (1875–8), the Spanish-American War (1898), the Boer War (1899–1902), the Russian Civil War (1917–21), the conflict in Upper Silesia (1921), the war in Ethiopia (1935–6) and the Spanish Civil War (1936–9).
8 Telegram from the ICRC to Sir Anthony Eden, 31 October 1956, and telegram from him to the ICRC, 1 November 1956, ICRC Archives, files 041 (Grande-Bretagne) and 201 (152); RICR, no. 455, November 1956, p. 659.
9 Telegrams to the Foreign Ministers of Egypt, France, Israel and Britain, 2 November 1956, ICRC Archives, file 201 (152).
10 Report by Dr Pidermann and Dr Rubli on their mission to Yemen from 24 December 1962 to 8 January 1963, and annex, and report by delegates Du Pasquier and Gasser on their mission to Yemen from 15 January to 6 February 1963, and annex, both in ICRC Archives, file 251 (138); Annual Report 1963, pp. 16–17.
CHAPTER IV

THE ADDRESSEES OF OFFERS OF SERVICES

To whom should the International Committee address its offers of services?

In international armed conflicts, the ICRC must obviously address its offers of services to all the warring parties, in particular to all authorities exercising power over persons protected by the Geneva Conventions: the wounded, sick and shipwrecked, prisoners of war and interned civilians. This requirement stems not only from the principle of impartiality, but also from that of humanity, which requires the ICRC to assist all victims of a conflict, whatever party may happen to control them.

The offer of services is not an expression of sympathy, but a duty. In making the offer, the ICRC therefore does not take into consideration the nature or political persuasions of the authorities it deals with. Those who reproach it for having maintained relations with Nazi Germany, despite the Hitler regime’s criminal nature, simply do not know or fail to understand the principles and procedures of humanitarian law. Indeed, how could the ICRC have managed to assist prisoners of war and interned civilians in Nazi hands if it had refused all contact with the Nazi authorities?

Similarly, the ICRC is not concerned with the legal status of the governments to which it offers its services. All that counts is whether those governments exercise de facto power over victims of the conflict, in particular over persons protected by the Geneva Conventions, whether they possess armed forces, or whether contacts with them may be conducive to its humanitarian activities. A few examples will illustrate the ICRC’s consistent stance in this regard.

- Throughout the Second World War the ICRC maintained contact with Allied governments exiled in London, even though none of them was recognized by the Axis Powers. At the same time, the ICRC offered its services to the satellites of the German Reich (Slovakia, Croatia), despite the fact that these ‘states’ did not enjoy any international recognition, either by the Allies or by the neutral countries.

- In the same way, in December 1971 the ICRC offered its services to the government of Bangladesh and sent a delegation to Dacca (Dhaka), even though the new state was then recognized only by India, whose armed intervention had enabled it to attain independence.

- In 1979 the Committee offered its services to the government of the People’s Republic of Kampuchea and sent a mission to Phnom Penh even
though the government was not recognized internationally, except by the
Soviet Union and its allies.4

Since 1945 the ICRC has established relations with several liberation
movements in Africa, the Middle East and Asia, long before they were
granted any kind of legal recognition or enjoyed the passing favours of
inter-governmental organizations.

However, the fact that the International Committee offers its services to a
party to a conflict does not have the slightest bearing on that party’s legal
status. As the ICRC has nothing to do with the legal status or legitimacy of
the authorities to which it proposes its services, nothing can be inferred from
its offers. And since it has no authority outside the field of humanitarian pro-
tection for victims of armed conflicts and similar situations, its actions can
have no effects beyond this field.

It follows that:

a) No party to a conflict can justifiably criticize the ICRC for offering its ser-
vices to an authority not recognized by that party, since it is duty bound
to make such offers.

b) No government can make its acceptance of an offer of services conditional
on a mark of recognition by the ICRC, as the Committee is not em-
powered to grant any such recognition.

c) No authority may try to pass off the ICRC’s offer of services as a form
of recognition, since the offers do not affect the legal status of their
recipients.

Do these three conclusions apply equally to non-international armed
conflicts?

In replying to this question, the conclusions reached for one category of
conflicts cannot automatically be transposed to another. The analogy is not
necessarily valid for the following reasons.

Conflicts between nations are governed by a principle which underlies the
whole of jus in bello and thus the whole of humanitarian law, namely that all
belligerents stand equal before the law of war. In the final analysis, it is based
on, and is an extension of, the principle of the equality of states. Because of
this principle, no party to such a conflict can legitimately object to the ICRC
likewise offering its services to the opposing side.

In a non-international conflict, however, the side claiming to be the legiti-
mate government will often invoke the inequality of the parties to the conflict
under national law, and perhaps international law, to forbid any contact with
the insurgents. Any relations with the other side will be considered as inter-
ference in the internal affairs of the state, or even a violation of national sov-
ereignty. It might even happen that both sides in a civil war claim to be the
sole legitimate authority and seek to prevent any contact between their oppo-
nents and third parties. In such cases, the ICRC is caught between the rival
claims of two sides who challenge each other’s legitimacy and try to prevent it from co-operating with the other.

This raises the question as to whether the International Committee has the right to offer its services to the different parties, without regard to their legal status, or whether it should in fact offer its services only to the side that claims to be the legitimate government? If the answer is yes, what criteria will it use to decide between the conflicting claims it will inevitably face as each side strives to prevent it from having contact with the other?

When the government of a state affected by civil war has claimed for itself, or has granted its adversary, the status of belligerent, no problem arises: recognition of belligerency brings into force most of the laws and customs of war, as well as the whole of humanitarian law, except for the provisions concerning Protecting Powers and occupied territories. The International Committee is then able to carry out all the tasks assigned to it by humanitarian law, just as though the conflict were taking place between nations, and to offer its services to each of the parties to the conflict without needing the prior consent of the government of the country in question.

But what if that recognition is withheld? Relations between the parties are then essentially governed by Article 3 of the 1949 Conventions, and the addressees of ICRC offers of services will obviously have to be determined on that basis. Before examining the question in this light, however, it is interesting to recall the ICRC’s past practice.

The ICRC first sought to help the victims of civil wars and internal unrest at the end of the First World War. In doing so, it found itself obstructed by the rival claims of parties which challenged each other’s legitimacy. It thereupon decided to establish working relations with any authorities, regardless of their status under national or international law, which exercised de facto power over persons it wanted to help:

The delegates of the International Committee [wrote Mrs Renée-Marguerite Frick-Cramer] established contact with all the Governments, legitimate or not, who exercised de facto authority, provided they recognized the principles on which the Committee’s work was founded: strict neutrality and equality of treatment of all parties and belligerents. Thus, the Committee’s delegates were in touch with the Moscow Government, that of Bela Kun in Hungary, of Petlioura and Skoropatski in the Ukraine, of Kurt Eisner in Munich, Denikine in Southern Russia, Kolchak and Semenov in Siberia, etc. The International Committee had a similar line of conduct in regard to Red Cross societies which were already constituted or in course of formation. They were able to act in this manner because their own institution was wholly devoid of political ties; this liberty of action enabled the Committee to take the initiative of repatriating prisoners of war on the Eastern front, and of carrying out that action on an international footing – the only possible method, under the circumstances.

Resolution XIV of the Tenth International Conference of the Red Cross, meeting in Geneva in 1921, had stipulated that as a general rule the International Committee, after having obtained the consent of the govern-
ment of the country engaged in civil war, should organize international assistance for the victims. If the government in question refused, the ICRC was to make a public statement of the facts. But the Conference had also foreseen, as exceptional cases, situations in which the government and the National Society had effectively ceased to exist. In that case, the International Committee would have ‘full power to endeavour to organize relief in such country ...’. The Conference had thus established the first exception, albeit limited, to the rule calling for the consent of the official government in a country in the throes of civil war.

During the conflict in Upper Silesia, the ICRC delegation established relations with all parties, regardless of their legal status and without these relations being seen as any form of recognition. It was this purely pragmatic approach which enabled the Committee to solve the humanitarian problems caused by the conflict, bypassing such considerations which had rendered the Inter-Allied Commission there incapable of doing so.

At the beginning of the war in Spain, the Committee asked the Spanish Red Cross for information about its needs and its ability to take action. Receiving no reply, it decided to send a delegate to Spain; but the question immediately arose as to whether it should contact only the government, or both sides? Should it first obtain the permission of the parties to the conflict or should it merely inform them of the mission? In line with its procedure after the First World War, the ICRC decided to send the mission to both sides and simply to inform the belligerents that the delegate was coming. Dr Junod, who had just returned from Ethiopia, was immediately appointed to the task: ‘The International Committee decided that it would restrict itself to informing the parties in conflict that it was sending Dr Junod, and that he would be visiting both parties.’

This decision was fully compatible with the humanitarian obligations of the ICRC; it was also quite logical in view of the division of Spain into two opposing camps. But it nonetheless ran the risk of serious difficulties, for if the Republican government had vetoed any contact with the insurgents, the Committee would have been forced either to back down and give up any hope of aiding the victims on the Nationalist side, or to ignore the government’s opposition and possibly face an angry confrontation.

Fortunately, the Republican government agreed to the sending of twin delegations, to Barcelona and Madrid on one hand, and to Burgos and Seville on the other, thus averting a crisis.

For all that, the question of establishing relations with an insurgent group had been brought sharply into focus. The episode showed that the solution proposed by Resolution XIV of the Tenth International Conference was inherently flawed, since it allowed a country’s legal government, as a general rule, to forbid the Red Cross to assist victims within an insurgent-held area.

Apart from the difficulty, in controversial situations, in determining which was the legal government whose consent must be obtained, this solution threatened to paralyse any Red Cross activity to help the victims of civil war.
The International Committee therefore submitted a new proposal to the Sixteenth International Red Cross Conference which met in London in 1938. In its draft, which took account of its experience during the Spanish Civil War, it stressed the spontaneous nature of its offers of services and proposed that its intervention should be subject to the consent only of the party to which the offer was made: there could no longer be any question of one side barring assistance for victims who happened to be under the control of the other.10

As we saw earlier, the Conference decided against any substantive discussion of this draft, adopting a more general resolution which failed to settle the question of the ICRC’s offers of services in internal conflicts either way.

However, the question had been raised, and was tabled again at the Diplomatic Conference of 1949. There at last an answer was found to it.

All discussion at the Diplomatic Conference on the subject of non-international conflicts was dominated by the overriding concern to establish rules that would apply equally to all parties to a conflict, whatever their status under general international law or internal legislation.

This is reflected in the first paragraph of Article 3:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions…11

In other words, the inequality of the parties to the conflict before domestic law and general international law does not prevent them being equally bound by the rules of Article 3, which imposes identical obligations on all sides.

This should not be considered surprising: experience and plain common sense dictated that no other solution would be worth the paper it was written on, since none of the parties to a conflict would agree to be bound by a set of rules which discriminated against it.

The principle of the equality of the parties also governs the ICRC’s offers of services; paragraph 2 of Article 3 states: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ This provision makes no distinction whatsoever between the parties, and does not benefit one side to the disadvantage of another.

The Committee may, therefore, offer its services to all parties, whatever their legal status and without any obligation to obtain the prior consent of any one of them. In plain terms, the ICRC does not need to seek the agreement of one side in order to help the victims under the control of the other.12

This reasoning is endorsed by the preparatory work. Before the adoption of Article 3 the most ardent opponent of the draft, General Oung, warned the Diplomatic Conference that the article would allow the Committee, or any other impartial humanitarian body, to offer its services at the request of either the legal government or the insurgents; he particularly stressed that in the latter case, the consent of the legal government would not be needed.13 So
the Conference was perfectly aware of what it was doing when it adopted the article, as were the governments when they ratified it.

However, by making offers of services to all parties to a conflict, would the Committee not risk being accused of granting the insurgents some kind of legal personality?

This fear is unfounded. Since the Committee offers its services on the basis of humanitarian criteria, regardless of the legal status of the parties concerned, no inference as to the legal personality of these parties can be made from its offers. Paragraph 4 of Article 3 is explicit: ‘The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’

Thus, the Committee’s offers of services can neither confer any kind of legal personality on an insurgent group, nor be considered proof of any such personality. Nor can such offers be seen as acknowledging, in any form, a state of belligerency, since the ICRC is not qualified to make such acknowledgement.

There is a danger, however, that in offering its services to the insurgents without first obtaining the prior consent of the side that claims to be the legal government, the Committee risks being accused of violating national sovereignty.

While the risk is there, any such accusation would be unjustified. The ICRC’s right to offer its services is not one that it has bestowed on itself; it stems from the will of the international community and from the respective governments’ ratification of the Geneva Conventions. As the Permanent Court of International Justice has stressed, ‘the right of entering into international engagements is an attribute of State sovereignty’. When the ICRC acts on the basis of rules expressly laid down by the states themselves, it cannot be accused of violating their sovereignty.

Nor could the Committee be accused of interference in the internal affairs of a country torn apart by civil war. A conflict situation that comes within the scope of international rules – even such a minimum set of rules as those expressed by Article 3 – cannot be considered an exclusively internal affair, at least as far as the application of those rules is concerned.

To sum up, I believe that the International Committee is entitled to offer its services to all parties to a conflict, regardless of their legal status, without having to obtain the prior consent of either side. These offers have no effect on the legal status of the parties to a conflict and cannot be considered either as an infringement of national sovereignty or as interference in a country’s internal affairs.

Notes

1 The ICRC usually sends its offers of services to the governments of the parties in conflict and informs the National Societies concerned. On some occasions, however, the ICRC has sent the offers to the relevant National Societies, asking them to relay them to the authorities.
This is a question of judgement which can be decided one way or the other, as long as the governments in question receive the offer.

Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939–June 30, 1947), vol. I, General Activities, ICRC, Geneva, May 1948, passim. In mentioning these two examples, it is not my intention to draw the slightest parallel between the position of the Allied governments exiled in London and that of the puppet states created by Germany; both are given simply as cases where the legitimacy of the governments concerned was contested by one side or the other.


On the effects of the recognition of belligerency, see the reference works listed above in Book I, Chapter IX, p. 296.


See above, Book I, Chapter IX, Section 6, pp. 263–6.

Minutes of the ICRC, vol. 15, plenary meeting of 21 August 1936, p. 4.


Emphasis added. For the legislative history of Article 3, see the documents mentioned in note 5 to Chapter II-A of Book II, Part I, above, pp. 340–1.

See also: D. Bujard, ‘Le droit d’initiative humanitaire en cas de conflit armé non international’, Minutes of the ICRC, plenary meetings, vol. 36, 1974, document attached to the convocation of the meeting of 18/19 December 1974, in particular pp. 11–12.


Permanent Court of International Justice, Case of the S.S. Wimbledon, Judgment of 17 August 1923, Collection of Judgments, Series A, no. 1, p. 25.

This study is concerned purely with legal considerations, and does not offer any conclusions beyond that sphere. It does not seek to express any opinion as to the advisability of taking action (or not), which is a question to be decided from case to case, according to the interests of the victims and the circumstances peculiar to each occasion.
CHAPTER V

THE EFFECTS OF OFFERS OF SERVICES

1. Introduction

The effects of the International Committee’s offers of services on the parties to a conflict will obviously be determined by the legal provisions on which they are based; which legal provisions are applicable will depend on the type of conflict in question.

This study of the effects of such offers must therefore be divided into two distinct sections, covering, respectively, international and non-international armed conflicts.

2. The effects of offers of services in international armed conflicts

In situations of international armed conflict, humanitarian law requires the ICRC to carry out certain tasks.

The Committee’s offers of services therefore impose definite legal obligations on each warring party from the start of an armed conflict to which the Geneva Conventions apply and as soon as there are victims, namely to allow the ICRC to perform the tasks assigned to it by humanitarian law and to grant it the facilities needed to do so.

Since the Conventions have affirmed the ICRC’s right to carry out activities such as drawing up lists of prisoners of war and civilian internees, visiting places where they are held, organizing relief supplies for them and supervising the distributions, and forwarding personal messages between them and their families,¹ the warring parties are obliged to ensure that the ICRC is able to carry out these activities. They must consequently respond favourably to any proposal it might make to this effect.

This view is firmly held by the Committee itself, which rightly believes that in international conflicts a government is obliged to accept its offer of services:

In the case of an international armed conflict, the ICRC may intervene by virtue of the four Geneva Conventions of 1949, in particular, under Art. 126 of the Third Convention and Art. 143 of the Fourth Convention; in addition, its right of
initiative is recognized in Art. 9 of the First, Second and Third Convention, and in Art. 10 of the Fourth Convention.2

These obligations do not derive from the ICRC’s offers, but from the legal provisions governing the proposed activities; in other words, their source lies in the commitments accepted by the states themselves.

So a belligerent cannot, in any situation to which the Geneva Conventions apply, reject the Committee’s offers of services without violating its own international commitments, the interests of the victims, the rights of its adversary, the prerogatives of the ICRC and the interests of all states party to the Geneva Conventions. For those states do indeed have an interest in the observance of the treaties they have signed and they are entitled to demand respect for them, even if their own nationals are not the victims of any violation. In short, to reject the ICRC’s offers in such circumstances is an unlawful act.

On the other hand, if the ICRC wishes to carry out humanitarian activities other than those specified in the Geneva Conventions, it may base its offers of services on its right of initiative under international customary law, the Statutes of the International Red Cross and Red Crescent Movement and Article 9/9/9/10 common to all four Geneva Conventions. In this case its offer constitutes a proposal which must be examined in good faith, but which the parties to the conflict are under no obligation to accept.

The same applies to offers of services by the ICRC to governments involved in an international crisis prior to the outbreak of an armed conflict: they must consider its proposals in good faith, but are not bound to act upon them. If a government rejects them, however, it must bear responsibility for the consequences.

* *

In view of these conclusions, it is distinctly alarming to note the disparity between the pledges made by states at international conferences and the conduct of too many governments in situations where they should honour those same promises.

To evade their treaty obligations, and in particular, to deny the ICRC the facilities to which it is entitled, governments can display a degree of ingenuity worthy of a better cause; all sorts of objections and obstacles crop up to keep the Committee away from the victims it is mandated to help.3

Some of these objections are based on arguments concerning the situation itself; they cannot be examined theoretically in a study such as this, since each must be assessed in the light of the relevant facts.

Others are based on legal considerations. As it would be impossible in this book to review them all, only those which are most frequently raised will be considered here in order to assess their validity in terms of humanitarian law.
Objections based on the absence of a declaration of war

Does the International Committee have the right to offer its services to parties to a conflict even if war has not been declared?

In the early days of humanitarian law, its application was linked to the existence of a ‘state of war’. This was not a factual observation, but a legal classification reflecting the will of the states concerned – or at least one of them – to be free of the constraints of the law of peace and to respect only the far less strict limitations imposed by the laws of war and of neutrality. As a general rule, hostilities had to be preceded by a declaration of war whose purpose was to replace the law of peace with the rules of *jus in bello* in relations between the belligerents themselves, and with those of the law of neutrality in relations between belligerents and neutral states.

For various reasons, in particular the prohibition of wars of aggression by the Covenant of the League of Nations, the Briand-Kellogg Pact and the United Nations Charter, there have been a growing number of conflict situations which the states concerned have refused to have classified as ‘war’, even though they bore every characteristic of a war between states.

In such situations, is the ICRC entitled to offer its services to the parties to the conflict, and are they bound to accept its offers? This question carries even broader implications: do the humanitarian rules in fact apply to situations which are not classified as ‘wars’?

The question arose at the time of the ‘Manchurian Incident’ (1931) and again during the Sino-Japanese conflict (1937); it will be recalled that the Japanese government did not consider humanitarian law applicable to those conflicts, since none of the parties concerned had recognized the existence of a state of war.

This was submitted by the ICRC to the Fifteenth International Conference of the Red Cross, which met at Tokyo in 1934. The Conference firmly supported the application of the Geneva Conventions by analogy in conflicts where there was no declaration of war, but did so in the form of a recommendation, with the result that the whole question of the law applicable to such situations remained open.

The point was finally settled at the Diplomatic Conference of 1949. Article 2, common to the four Geneva Conventions, states in the first paragraph:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Thus, the application of the 1949 Conventions depends solely on a factual circumstance – the existence of armed conflict – and not on any interpretation of that circumstance which the parties to the conflict, or anyone else, might care to give.
The absence of a declaration of war therefore does not undermine the right of the International Committee to offer its services and in no way diminishes the effects of these offers.

From the perspective of this analysis, paragraph 1 of Article 2 raises no problems of interpretation. But would the Conventions apply even if none of the parties to a conflict acknowledged a state of war? There can be no doubt about it: the concessive clause ‘even if the state of war is not recognized by one of them’ serves only to reinforce the initial proposition – it cannot restrict its scope. Moreover, a situation of this kind would undeniably be covered by the phrase ‘any other armed conflict which may arise between two or more of the High Contracting Parties’. So the Conventions would indeed apply in such an event and the International Committee would have the right to offer its services to the belligerents.

The conflict over the Falkland/Malvinas Islands (1982) is a clear example of this: the ICRC offered its services to both sides, although neither Argentina nor Britain acknowledged the existence of a state of war. Both accepted its offer.\(^\text{10}\)

In its judgment of 27 June 1986 in the case of military and paramilitary activities in and against Nicaragua, the International Court of Justice had no hesitation in stating that relations between the United States and Nicaragua were subject to international humanitarian law, even though war had not been declared between the two countries, nor diplomatic relations broken off.\(^\text{11}\)

That judgment confirmed unequivocally that international humanitarian law applies to all international armed conflicts, even those in which none of the belligerents recognizes the existence of a state of war.

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\text{\textquote{\textbf{Between war and peace, there is nothing}, wrote Cicero, implying that there can be no intermediate stage between two diametrically opposed situations.}}\]\(^\text{12}\)

History has long refuted this claim. Hostile acts of limited range, such as armed incursions, retaliatory attacks, air strikes, occupation of a part of the adversary’s territory, and blockades, are steadily increasing. Can the Geneva Conventions apply to situations like these, which have been aptly termed ‘hostilities short of war’?

As the \textit{Commentary} published by the ICRC so rightly points out, Article 2 leaves no room for doubt:

\[
\text{Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, how numerous are the participating forces.}\]\(^\text{13}\)

As soon as a conflict results in victims, the Committee may offer its services. It makes no difference how many victims there are. If there is only a single
prisoner or wounded person, the Conventions apply. As the Commentary puts it: ‘The respect due to human personality is not measured by the number of victims’.14

**Objections based on the principle of exclusive domestic jurisdiction**15

Is a state justified in turning down the ICRC’s offer of services by invoking the principle of non-interference in affairs that come essentially or exclusively within its domestic jurisdiction?

To answer the question, it must first be considered whether the activities proposed by the Committee on behalf of the victims of war come within the scope of this principle.

As the Permanent Court of International Justice found in the case of the nationality decrees issued in Tunis and Morocco, the development of international relations determines the domain reserved for the exclusive jurisdiction of an individual state:

The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.16

Quite obviously, it is up to international law to set the limits, for once a matter is governed by international law, it no longer comes under the exclusive jurisdiction of any particular state. This can be inferred from Article 15, paragraph 8, of the Covenant of the League of Nations:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The same conclusion can be drawn from Article 2, paragraph 7, of the United Nations Charter, even though the wording is less precise:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The preparatory work in fact shows that if it was not felt necessary to stress that something came within national jurisdiction, according to international law, it was because this could be taken for granted.17 Furthermore, it is evident that the interpretation and application of Article 2, paragraph 7, of the Charter are matters that come within the scope of, and are governed by, international law.

This is confirmed by the practice of the United Nations. Its political organs have never allowed domestic jurisdiction to take precedence in matters governed by provisions of treaty or customary law.18
The International Court of Justice has likewise concluded that the question of whether an act came within the national jurisdiction of a state had to be decided ‘in the light of the principles and rules of international law...’.\textsuperscript{19}

It is therefore clear that the way in which a belligerent state treats enemy nationals – or, for that matter, its own nationals when they are protected by international law – cannot be considered as an exclusively internal matter, particularly when the fate of these nationals is governed by treaty or customary rules. More generally speaking, the principle of exclusive domestic jurisdiction does not apply to any situation that is regulated by treaty-based or customary international humanitarian law.

Objections based on the principle of exclusive domestic jurisdiction are therefore null and void.

This does not, however, prejudice national sovereignty, since one of the attributes of sovereignty is precisely the ability to assume rights and obligations under international law.

\textbf{Objections based on provisions of domestic law}\textsuperscript{20}

May a party to a conflict invoke provisions of its own domestic law to prevent the International Committee from carrying out the tasks assigned to it under the Geneva Conventions?

There can be no doubt about the answer: the very concept of an international legal order postulates its pre-eminence over any domestic legal order, since the common will must prevail over the individual will of each party.

International courts and tribunals have consistently emphasized the primacy of international law: ‘It is incontestable, and uncontested, that international law stands above internal law’, stated the French-Mexican Claims Commission in its ruling of 19 October 1923 in the case of Georges Pinson.\textsuperscript{21} Similarly, the Permanent Court of International Justice has declared: ‘It is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty’.\textsuperscript{22} The same rule was stressed in the award of 23 March 1936 in the case of the Warsaw Electricity Company:

A properly concluded treaty is a source of objective law for contracting states, having obligatory force just as much within each state as it does internationally, even in cases where the rules of the said treaty would contradict national laws enacted before or after its conclusion.\textsuperscript{23}

Article 27 of the Vienna Convention on the Law of Treaties, of 23 May 1969, stipulates that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This is an immutable principle that cannot be overturned without compromising the very concept of international relations founded in law. Consequently, a state may not avail itself of the rules of its domestic law in order to escape its international obligations or, in particular, to prevent the ICRC from carrying out the tasks assigned to it under the Geneva Conventions.
**Objections based on the argument of military necessity**

‘Necessity knows no law’, as the saying goes. But is a state justified in invoking military necessity as an argument for rejecting the International Committee’s offers of services?

In order to answer this question, it is necessary to determine whether the pressure of military necessity would allow a belligerent to violate the rules of war.

‘It is established that the purpose of all law is to ensure the co-existence of interests deserving of legal protection. This also undoubtedly holds true for international law’, wrote Professor Max Huber in the arbitral award handed down in the case of British property in Spanish Morocco.

In the field of *jus in bello* these interests are not hard to identify: as the St Petersburg Declaration of 29 November/11 December 1868 put it, the objective was to ‘conciliate the necessities of war with the laws of humanity’.

This leads to the conclusion that the principle of military necessity had *already* been taken into account in formulating the rules of the law of war; this is confirmed in the preamble to the Hague Convention (IV) respecting the Laws and Customs of War on Land, of 18 October 1907:

> ... these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

The line between military necessity and the requirements of humanity can be drawn in three ways:

a) by accepting that military necessity must prevail, in which case lawmakers have abandoned any attempt to establish rules limiting the belligerents’ freedom of action;

b) by accepting that military necessity must yield to the requirements of humanity, in which case the argument of military necessity may not be used to justify breaking a rule which is absolutely binding on the belligerents;

c) by seeking a compromise reconciling both interests, in which case provision is made for a derogation, in the event of imperative military necessity, from the rule limiting the belligerents’ freedom of action. An example is Article 53 of the Fourth Geneva Convention, which forbids the occupying power to destroy property within the occupied territory ‘except where such destruction is rendered absolutely necessary by military operations’.

There can be no question, therefore, of allowing a general exception to the rules of war in order to accommodate military necessity, since the very purpose of these rules is to establish a dividing line between military necessity and the requirements of humanity. The idea of any such exception – which would deprive *jus in bello* of any legal impact – has been firmly rejected by jurisprudence and by most legal doctrine.
This is understandable. To allow the laws of war to lose their binding force in the event of military necessity would be tantamount to saying that the laws of war are binding as long as they do not curtail the belligerents’ freedom of action, but cease to be binding as soon as they become restrictive, in other words that laws are obligatory when they do not apply, but not when they need to be applied. Such an idea is clearly untenable.

The argument of military necessity can therefore be invoked only in cases where treaty or customary law has expressly provided for such an exception. To determine whether a belligerent has the right to use that argument to reject the International Committee’s offers of services, it is necessary to check whether the law allows a waiver to accommodate military necessity, and the limits to any such waiver.

A cursory examination of the Geneva Conventions reveals that visits to camps for prisoners of war and interned civilians ‘may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure’.

Conversely, the provisions concerning the transmission of capture cards and of lists of prisoners, the dispatch of individual and collective relief and the supervision of distributions allow no exceptions. A belligerent cannot use the excuse of military necessity to prevent the ICRC from carrying out these tasks or to refuse it the facilities needed to do so. In any case, it is hard to see how activities of this kind could conflict with any operational military needs.

Whatever the circumstances, a belligerent may not cite pressure of military necessity to reject the ICRC’s offers of services as a whole.

**Objections based on a fundamental change of circumstances**

Can a belligerent refuse the ICRC’s offers of services on the grounds that unforeseen circumstances have arisen?

The question raises a complex legal problem – that of the effects which a change in the state of facts and conditions upon which a treaty was founded may have on the binding force of that treaty. Few other questions have given rise to so much controversy at both the theoretical and practical levels.

On the one hand, it may seem questionable that a state which has entered into clearly defined contractual obligations, based on known circumstances, should find the scope of those obligations suddenly and radically altered by unforeseen circumstances.

On the other hand, however, there can be no question of a state citing a change of circumstances to withdraw unilaterally from obligations under a duly concluded treaty; the effect would be to deprive international commitments of all binding force.

Notwithstanding the discussions over the doctrine of *rebus sic stantibus*, some rules are uncontested. It is thus generally accepted that no state may invoke a change of circumstances as a ground for terminating, withdrawing
from or suspending the operation of a treaty unless the following four conditions are met:

a) a fundamental change of circumstances has occurred with regard to those existing at the time of the conclusion of the treaty;
b) this change was not foreseen by the parties when concluding the treaty;
g) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty;
d) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.33

Does a change of circumstances that meets the four conditions specified above entitle a contracting party to denounce the treaty unilaterally, or merely to seek a revision? Unfortunately, the Vienna Convention on the Law of Treaties says nothing on this point, which remains a subject of controversy.

It is not my intention to try to settle this question or to comment on the validity, in international law, of the rebus sic stantibus clause. However, in view of the uncertainty surrounding the effects of a fundamental change of circumstances, it is necessary to examine whether a state that is party to the Geneva Conventions may invoke such a change to justify suspending their application.

The Conventions were evidently not drawn up with any particular situation in mind, but were meant to apply to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’, as well as to ‘all cases of partial or total occupation of the territory of a High Contracting Party’.34 It therefore cannot be claimed that the Conventions were drawn up in view of particular circumstances likely to undergo any change which might be termed fundamental.

Moreover, the officers, diplomats and lawyers who took part in the 1949 Diplomatic Conference were perfectly aware of the unpredictable nature of modern warfare. They took account of this by drawing up general rules of a broad scope which could be applied in any situation that might arise. None of the governments which subsequently became party to the Geneva Conventions could have been in any doubt that the reality of war is never quite what one expects.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met in Geneva from 1974 to 1977, by no means believed that the Geneva Conventions were out of date. On the contrary, it confirmed their binding force without the slightest reservation.35

Lastly, the states party to the Geneva Conventions have pledged to respect and ensure respect for them ‘in all circumstances’.36 This itself is an indication of the parties’ consent not to invoke a fundamental change of circumstances as a justification for denouncing the Conventions or ceasing to apply them.
For all these reasons, and whatever effects a fundamental change of circumstances may ultimately have on the binding force of other treaties, it is out of the question for any state that is party to the Geneva Conventions to take such a change as an excuse for suspending their application. Nor may any state use this argument to reject the International Committee’s offers of services.

As already mentioned in another context, in May 1945 the Allies advanced the argument of a fundamental change of circumstances to deny prisoner-of-war status to German soldiers captured after Germany’s unconditional capitulation and to give them the status of ‘Surrendered Enemy Personnel’. A similar measure was taken later with regard to captured Japanese military personnel. The Allies justified this by maintaining that the 1929 Diplomatic Conference had probably not contemplated a situation in which all the armed forces of a state gave themselves up simultaneously following an unconditional surrender.37

This argument is dubious. In terms of the law, Germany’s unconditional capitulation was nothing more than a particular case of debellatio,38 of which there are numerous examples in history. Under the circumstances, the unforeseen nature of the change and its alleged fundamental nature are far from established.

Although the ICRC’s delegates were allowed to visit the ‘Surrendered Enemy Personnel’ and provide them with assistance, this decision by the Allies obstructed the Committee in several ways. The Allies’ failure, for example, to send the Central Prisoners of War Agency lists of names of German soldiers taken prisoner after the capitulation obviously hindered the ICRC’s work.39

Whatever the legality of this decision with regard to the 1929 Convention, one thing is certain: under the 1949 Geneva Conventions, any such measure would be clearly and manifestly illegal.

**Objections based on the theory of reprisals**40

Is a belligerent justified in preventing the International Committee from carrying out its duties under the Geneva Conventions in aid of enemy nationals, on the grounds that the enemy in question had allegedly violated the law of war?

This raises the question as to whether reprisals are legal under humanitarian law.41

Customary law and international jurisprudence subject the use of reprisals to three conditions: the prior existence of an act contrary to international law, refusal to heed demands for redress, and a certain proportionality between the harm inflicted through reprisals and the harm suffered as a result of the act which prompted them.42 Furthermore, there must not have been any undertaking to abstain from taking reprisals.43

While recourse to reprisals is morally objectionable, reflecting the primitive
and decentralized state of international relations, it is not prohibited by international law provided the above conditions are met.

In the field of humanitarian law, however, exercise of the right of reprisals raises extremely serious objections:

a) It inflicts the consequences of an unlawful act on persons who are themselves victims of war and who cannot possibly be held responsible for the act which prompted the reprisals; as such, it is a manifest breach of the natural right of every human being to be treated with justice, safe from arbitrary acts and without being made to bear the responsibility for acts which he or she did not commit.

b) As a means of seeking redress for a wrong, it is particularly inefficient; the belligerent targeted by the reprisals is likely to persist in the conduct for which it is blamed rather than admit responsibility for an unlawful act. This attitude is shown in a host of examples throughout history, a particular case being that of the handcuffing of British, Canadian and German prisoners during the Second World War.44

c) Reprisals may well set off a spiral of mutual recriminations and unlawful acts: the belligerent targeted by the reprisals will deny the initial transgression and will in turn use the violation of which it now claims to be the victim as an excuse to carry out further unlawful acts.

d) Finally, given that a belligerent is not confined, when responding to a violation of a given rule, to violating that same rule, the right of reprisals provides a convenient means for a belligerent to flout any provision which it finds burdensome, while continuing to demand respect for it by the enemy. The theory of reprisals can therefore open the door to all kinds of abuse.45

For all these reasons, the International Committee has unremittingly campaigned and protested against the use of reprisals, especially during the two world wars, and has sought to limit their effects.46

For its part, the 1949 Diplomatic Conference formally prohibited reprisals against persons, buildings and property protected by the Geneva Conventions.47 The Diplomatic Conference of 1974–7 extended the ban on reprisals to include all persons protected by the Conventions and Protocol I.48 This prohibition is unreserved and unrestricted:

The prohibition of reprisals is absolute, and remains so when an offence, which would formerly have justified reprisals under international law, is committed – no matter what the nature of the offence may be.49

Consequently, no belligerent is entitled to invoke the right of reprisals to prevent the International Committee from carrying out its assigned tasks under the Geneva Conventions. To do so would constitute not only a harsh measure against the opponent, but also an infringement of the rights and prerogatives of the ICRC that no act ascribed to the opponent could ever justify.

Although the provisions of the Geneva Conventions are thus perfectly clear, the International Committee has more than once found itself prevented
from carrying out its tasks under humanitarian law by a belligerent claiming the right to take reprisals.

The most striking example occurred after the Arab-Israeli war of October 1973. On the grounds that the government of Israel did not recognize the applicability of the Fourth Geneva Convention in the occupied territories, Syria refused to give the names of the Israeli prisoners of war it was holding and withheld permission for ICRC delegates to visit them. As a countermeasure, Israel prevented ICRC delegates from entering the Syrian territories it had occupied during the conflict. The resulting stalemate was not resolved until several months later, in the course of political negotiations conducted by the US Secretary of state, Dr Henry Kissinger.50

In an appeal dated 21 January 1974 and addressed to the 135 signatory states, the ICRC protested over the fact that

The competent authorities all too often make reciprocity a condition for the application, totally or in part, of the Geneva Conventions. This is equivalent, in prevailing circumstances, to the exercise of reprisals. They also make the accomplishment of their humanitarian obligations subject to political and military demands which are alien to the Geneva Conventions.

The Committee went on to stress that

commitments under the Geneva Conventions are absolute, and that states, each one to all others, bind themselves, solemnly and unilaterally, to observe in all circumstances, even without any reciprocal action by other states, the rules and principles which they have recognized as vital.51

Under the law, it must be accepted that whatever the reasons put forward by the two governments, they could not on any account justify reprisals against persons protected by the Geneva Conventions. From a humanitarian perspective, the anguish and suffering which these reciprocal violations of the Conventions inflicted on the hundreds of wounded, prisoners and civilians on either side and on their families can only be deplored.

**Objections based on the absence of reciprocity**52

If one side in a conflict turns down the ICRC’s offer of services and prevents it from working, is the Committee still entitled to offer its services to the other side? And if so, would the latter be justified in also rejecting the Committee’s offer because of the absence of reciprocity?

To answer these questions, the law applicable to such a situation must first be defined.

It is widely accepted that in accordance with the rule *inadimplenti non est adimplendum*, a state affected by a material breach of a treaty is allowed to suspend application of the treaty, wholly or in part, in its relations with the defaulting state.53

However, this rule, which reflects the largely contractual nature of international relations, does not apply to treaties such as the Geneva Conventions,
whose purpose is not to provide for an exchange of goods and services but to establish an objective legal framework to protect human beings in all circumstances.

This is made clear in the first article of the Geneva Conventions, under which the contracting parties undertake to respect and ensure respect for the Conventions ‘in all circumstances’. Quite obviously, this stipulation also applies in cases where a belligerent fails to fulfil its obligations.54

Furthermore, using the absence of reciprocity by an opponent as a motive for denying the nationals of that country the ICRC’s protection and assistance amounts to a form of reprisals against those persons. It has already been established that the Geneva Conventions and Protocol I expressly forbid their signatories to take any retaliatory measures against persons or property protected by those instruments.55 All that was said in the preceding section about the prohibition of reprisals applies equally here.

These conclusions are confirmed in the law of treaties. Article 60, paragraph 5, of the Vienna Convention of 23 May 1969 specifies that the rule mentioned above, under which a party that is specially affected by a material breach of a multilateral treaty may invoke that breach as a ground for suspending the operation of the treaty in whole or in part in its relations with the author of the violation, does not apply ‘to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.’56

The situation that results from the refusal by a party to a conflict to accept the Committee’s offers of services must be analysed in the light of these provisions.

Obviously, this sort of situation would not prevent the ICRC from offering its services to the other belligerents; nor would it prevent it from carrying out the tasks assigned to it under the Conventions, apart from those which, by their very nature, require the co-operation of both parties. The ICRC’s mission is above all humanitarian and charitable – the fact that one belligerent hampers its work does not in any way relieve the Committee of its obligations towards other belligerents to carry out the duties assigned to it by the international community.57

This conclusion does not conflict with the principle of impartiality. The Committee’s impartiality is sufficiently demonstrated by its having offered its services to all parties to the conflict and by its continuing willingness to cooperate with them all.58 If one party rejects the Committee’s offer of services, it must take sole responsibility for its action; the ICRC cannot be held responsible for a decision in which it had no part.

With regard to the second part of the original question – whether the adverse party may in turn reject the ICRC’s offer of services on the grounds of a lack of reciprocity – the answer has to be no. As we have seen, the absence of reciprocity does not release a party to conflict from its obligations under the Geneva Conventions.
This is consistent with the ICRC’s practice; as stated earlier (pages 144–5), during the war in Ethiopia the ICRC felt that the fact that Italy had turned down its offer of services did not prevent it from providing assistance to people in distress on the Ethiopian side.59

During the Korean War the Committee persistently demanded that it be allowed to carry out its work, as laid down by the Geneva Conventions, for persons under the control of the United Nations Unified Command and the South Korean government, even though its delegates were not allowed into North Korea.60

The International Committee adopted the same position during the war in Vietnam: it maintained that the governments of the United States and of South Vietnam remained bound by their obligations under the Conventions despite the absence of reciprocity on the part of North Vietnam and the National Liberation Front, and sought to base its work in South Vietnam, in particular its activities for prisoners of war, on the Conventions.61

The absence of reciprocity nonetheless does place the International Committee in a difficult position. It is unable to play its essential role as a neutral intermediary, and instead finds itself locked into a partnership with only one side; it cannot make use of the argument of mutual interest, or carry out certain activities which, by their very nature, call for the co-operation of both sides. And even where its activities are accepted, it often finds itself blamed for being unable to do anything for persons in the power of the enemy. In these circumstances, needless to say, its work can hardly be at its most efficient.

Reciprocity can be regarded as a de facto element, of a sociological nature, in relation to the ICRC’s work, but the observance of humanitarian rules may not be made conditional upon it.62

**Objections based on an agreement between the parties to a conflict**63

Do belligerents have the right to agree between themselves to turn down the ICRC’s offers of services?

This in fact happened on several occasions during the Second World War. Following the agreements between Scapini and Hitler (November 1940) and between Laval and Sauckel (April 1943), the captivity of many French prisoners of war was ‘suspended’ so that they could be classified as civilian workers; they were thereby withdrawn from ICRC supervision and could no longer benefit from collective relief supplies. Other agreements to bypass the 1929 Convention were reached between the Allies and the Italian government of Marshal Badoglio.64

This is not the place to discuss the legality of the above agreements with regard to the 1929 Convention.65 But any special agreement designed to derogate from the provisions of the 1949 Conventions would unquestionably be illegal. Common Article 6/6/6/7 expressly states that no agreement reached between belligerents may ‘adversely affect’ the situation of protected persons,
as defined by the Geneva Conventions, nor ‘restrict the rights’ which it confers upon them.

This provision, expressing the desire of the Diplomatic Conference to establish legal protection applicable in all circumstances, is unqualified and unrestricted. It applies equally to agreements freely entered into by both sides and to those whose terms are dictated by the side which has the upper hand as a result of military successes.

Therefore any agreement designed to waive the provisions of humanitarian law would be flawed from the outset, since the states party to the Geneva Conventions have expressly agreed not to enter into accords of that nature.\(^66\)

As a result, a belligerent does not have the right to reject the ICRC’s offers of services on the grounds of an agreement either with its opponent or with an ally.

**Objections based on the renunciation by protected persons themselves of the ICRC’s protection**\(^67\)

Does a belligerent have the right to turn down the ICRC’s offer of services on the grounds that the protected persons have themselves declared that they do not wish to benefit from the ICRC’s activities?

The question here is whether or not protected persons may renounce the protection accorded to them under the Conventions; the work of the ICRC is in effect no more than an instrument of that protection.

This point arose during the Second World War. Article 31 of the 1929 Geneva Convention on the treatment of prisoners of war had prohibited their use for work in support of the war effort. In order to meet the enormous need for labour in its war industries, Germany urged the prisoners it held to renounce their POW status and agree to be ‘transformed’ into civilian workers. Whether because of the pressure of the detaining authorities, or in a desperate attempt to escape what seemed endless captivity, or merely tempted by the benefits they were promised, thousands of prisoners agreed.\(^68\)

But they were soon to regret it. Having renounced prisoner-of-war status, they found themselves without recourse in the face of arbitrary treatment; they were outside the ICRC’s scope of activity; as food became scarcer they could not receive parcels from abroad, since the Allied blockade prohibited the sending of food supplies to people working to increase Germany’s military potential.

After hostilities ended, France – for different reasons – also proposed transforming the prisoners of war in its power into civilian workers.\(^69\)

These precedents clearly opened a loophole which seriously threatened the integrity of the protection offered by the Conventions.

Steps were promptly taken to close it at the 1949 Diplomatic Conference when humanitarian law was revised after the Second World War: prisoners had to be protected not only against being placed under duress to renounce the protection to which they were entitled, but also against themselves. This
led to common Article 7/7/7/8: ‘[Protected persons] may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention …’

This article imposes an obligation not only on protected persons themselves, by forbidding them to renounce the rights granted to them by the Conventions, but also on the belligerents, as the states party to the Geneva Conventions have pledged in advance not to accept any such renunciation.

There can be no doubt that the intercession of the ICRC forms part of the rights guaranteed to protected persons by the Conventions. The detaining authority may not, therefore, use any alleged renunciation of rights by protected persons as an excuse to obstruct the Committee’s work.

That being said, if it is clear that the protected persons do really refuse the ICRC’s intercession of their own free will, the Committee must take this into account. It cannot force its protection on people who do not want it. But it then becomes the ICRC’s task to ascertain, through private interviews, whether this really is the prisoners’ wish – it cannot be left to the detaining power to speak for the prisoners in order to create a barrier between them and the ICRC, whose mission is to ensure their protection. To allow this would open the way to all sorts of abuses and jeopardize the entire system of legal protection.

Yet the practice persists. During the war between Iran and Iraq each side claimed, despite the crystal-clear provisions of the 1949 Conventions, that some prisoners refused the ICRC’s protection. On the basis of this allegation they prevented the ICRC from performing its duties in aid of those prisoners.

Objections based on the origins of the conflict

May a belligerent turn down the ICRC’s offer of services on the grounds that it is a victim of aggression?

The question raises a much broader issue: that of the autonomy of rules governing relations between belligerents (jus in bello) with regard to rules prohibiting the use of force (jus ad bellum). Can the fact that one side has launched a war of aggression alter the conditions of application of jus in bello and, more specifically, the conditions of application of humanitarian law?

In its modern form, international humanitarian law developed in a legal context in which recourse to arms was permitted; war was an attribute of sovereignty; it was lawful provided it was waged on the king’s orders; a state that resorted to it was the sole judge of the reasons for that decision. Such was the legal opinion of governments, and the dominant doctrinal view, during the nineteenth century. Seen from that perspective, the question of the possible subordination of jus in bello to jus ad bellum did not arise.

Today, the context is different. Recourse to war was first restricted by the Covenant of the League of Nations, then outlawed altogether by the Briand-Kellogg Pact and the United Nations Charter. Under the terms of the Briand-Kellogg Pact, the signatories declared that they condemned ‘recourse to war for the solution of international controversies’ and that they
renounced it ‘as an instrument of national policy’. Moreover, the Charter of the United Nations forbids any use of force in international relations, except for the collective enforcement action provided for in Chapter VII and the right, reserved in Article 51, of legitimate individual or collective self-defence.

This brings us to the crucial question: does the prohibition of the use of force alter the conditions governing the application of *jus in bello*?

Some writers, especially in the United States and the former Soviet Union, believe that it can. There are then two hypotheses:

_Either_

a) a war of aggression is deemed to be an unlawful act – the ultimate international crime – over which no regulation is possible; it must then be accepted that in the event of aggression *jus in bello* does not apply to either party;

_Or_

b) the illegal use of force is considered to have the sole effect of divesting the aggressor of the rights conferred by *jus in bello*, whereas all the aggressor’s obligations under that law remain unchanged; the result would be a differentiated application of the law of war, with the aggressor state still held to its obligations as a belligerent, and the victim of aggression freed of all obligations towards its enemy.

Only the first hypothesis draws all the logical consequences of a subordination of *jus in bello* to *jus ad bellum*. Nonetheless, it must be rejected without hesitation, for an essential purpose of all law, whether national or international, is to regulate situations resulting from unlawful acts. Moreover, since war is prohibited under the United Nations Charter except in response to aggression, it would have to be assumed that governments had drawn up rules lacking any field of application, an assumption which would be absurd. Finally, this hypothesis would open the way to utter lawlessness and a degree of savagery alongside which the horrors of earlier wars would pale into insignificance. Brought about by an abdication of the rule of law, it would produce both senseless and appalling results.

The second hypothesis calls for deeper examination. The case for a differentiated application of the laws and customs of war may be based on three arguments:

a) Justice demands that a clear distinction be made between the aggressor and the victim of aggression; it would be unjust for humanitarian law to place both the aggressor state and the state resisting aggression on the same footing – on the contrary, the law should come to the aid of the victim while obstructing the aggressor; and it should unequivocally condemn the aggressor.

b) As a war of aggression is the ultimate war crime engendering and encompassing all others, no one can be required to observe the law of war *vis-à-vis* the party which, by starting the war, has broken the very first rule thereof; in other words, the aggressor state outlaws itself.
c) In accordance with the maxim *ex injuria jus non oritur*, the aggressor state may not enjoy rights deriving from an unlawful act.

How valid are these arguments?

Clearly, the prohibition of the use of force would have no practical effect unless it were backed by sanctions in the form of an adverse distinction between the aggressor and the victim of aggression. It is incontestable and uncontested that contemporary international law does make such a distinction, as shown by the collective enforcement measures provided for in Chapter VII of the United Nations Charter, by the right of legitimate individual or collective self-defence, and by the provisions concerning relations with third states, the acquisition of territory, treaties imposed by the aggressor on the victim of aggression, and reparations at the end of hostilities. Moreover individuals who have planned, launched or directed a war of aggression may be held personally liable under criminal law.

This raises the question as to whether the illegality of the use of force may justify a discriminatory application of rules governing relations between the belligerents, in particular the rules of humanitarian law?

This question must be examined in the light of legal doctrine and positive law.

In legal doctrine, there are important exceptions in both national and international law to the maxim *ex injuria jus non oritur*. It can therefore hardly be recognized as one of the general principles of law referred to in Article 38, paragraph 1(c), of the Statute of the International Court of Justice. But even if it were recognized as such, its application to the case in point would result from confusion at two levels: that of formal logic (confusion between cause and accident), and that of the law (confusion between the source of a right or obligation and the material fact which renders that right or obligation applicable). If a house burns down, it is not the fire but the insurance policy which gives the householder the right to claim from the insurance company – otherwise, no one would bother paying the premiums. Similarly, the source of the rights and obligations stemming from *jus in bello* is not war itself, but the humanitarian conventions and customary law; the armed conflict – whatever its classification – is no more than the material fact which brings the treaty-based or customary rules into play. Otherwise the belligerents would possess identical rights and obligations, whether or not they were party to the humanitarian conventions – and this is clearly not the case. The maxim *ex injuria jus non oritur* is therefore irrelevant to the case in point.

The argument which likens an aggressor state to an outlaw must also be rejected. Great caution is required when seeking to transpose concepts of national law to the international level, particularly those that derive from criminal law. In the case in point, the transposition is both deceptive and fallacious: deceptive, because it likens a state’s international responsibility to an offender’s criminal liability; fallacious, because it presumes that a criminal is automatically deprived of any legal protection, something no legal order
could allow. In any state governed by the rule of law, a criminal remains subject to and protected by penal law, however dreadful the charges against him. As an unlawful act, a war of aggression incurs a sanction, or even a number of sanctions, through the right of legitimate individual or collective self-defence, collective enforcement measures, non-recognition of territorial gains acquired by force or of treaties imposed by the threat or actual use of force, discriminatory measures by third parties and a demand for reparations from the aggressor once hostilities have ended. But the war of aggression may under no circumstances have the effect of placing the aggressor state beyond the bounds of the law.78

There remains the argument based on the demand for justice or equity. While this is undoubtedly the most persuasive from a moral point of view, it betrays a complete misunderstanding of the purpose of humanitarian law. There is no question of humanitarian law placing the aggressor state and its victim on the same footing, since it is simply not competent to do so; its sole objective is to protect the human being as such, to the exclusion of all political, military, ideological, religious, racial, economic or other considerations. In humanitarian law there is but one equality: that founded on the immutable right of all victims of war to be treated according to the principle of humanity. Furthermore, no demand for justice or equity could possibly justify all nationals of a country, even all members of its armed forces, being considered as criminals simply because they are citizens of a state regarded as an aggressor. There is no right to infer, from a state’s international responsibility, the criminal liability of every member of its armed forces or of each of its citizens.

The main arguments in favour of a discriminatory application of *jus in bello* must therefore be rejected. What is more, certain imperative considerations demand that the principle of the equality of belligerents before the law of war be upheld.

For a start, there are the obvious difficulties in designating the aggressor. Despite more than half a century of discussions at international level, there is no general, binding agreement on the definition of aggression. It is not defined in either the Briand-Kellogg Pact or the United Nations Charter. Nor does Resolution 3314 (XXIX), adopted on 14 December 1974 by the General Assembly of the United Nations,79 come anywhere near providing a real definition. It says virtually nothing with regard to the indirect forms of aggression all too common nowadays, such as subversion, foreign intervention in civil wars, occupation with the acquiescence of a puppet government, and so on. Furthermore, in making an exception for wars of national liberation,80 Resolution 3314 took account of an essentially subjective factor – the grounds for the use of force – which is incompatible with any proper definition. Moreover, the definition it does contain is not binding on the Security Council.81

Could the question be resolved from case to case by a body possessing the necessary authority? It is up to the Security Council to determine the
existence of an act of aggression. Under the terms of Article 25 of the Charter, this determination is valid *erga omnes*, meaning that all UN member states are bound to accept it. Yet this does not overcome the problem entirely, for in the absence of legal criteria binding on the Security Council, its decisions can be nothing other than political acts, and it is hard to see how they could have legal effects beyond those laid down by the Charter or by other treaty provisions. Crucially, there is nothing in the Charter to authorize the discriminatory application of *jus in bello* in relations between belligerents. Furthermore, a determination of aggression requires the affirmative vote of all permanent members of the Council; the Council would therefore be paralysed each time the aggressor happened to be one of the permanent members, or an ally or client state of a permanent member. Given the present structure of the international system, only the most exceptional circumstances – such as those of June and July 1950, at the start of the Korean War, or of summer and autumn 1990, in the wake of the Iraqi occupation of Kuwait – would enable the Council to make such a decision.

There is consequently a great temptation to do without a decision by the Security Council. Advocates of a discriminatory application of the law of war have proposed either to let the matter be decided by a General Assembly resolution, or to be guided by public opinion. However, nothing in the Charter assigns such powers to the General Assembly; and as for public opinion, it is enough to consider who its spokesmen might be to realize where that precarious option would lead: every government would decide for itself that it was the victim of aggression.

Without centralized and mandatory legal procedures allowing the determination of aggression in each case according to clear legal criteria, and in such a manner as to be equally binding on all belligerents, the theory of the discriminatory application of *jus in bello* would lead inevitably to non-application of the law on all sides. Each belligerent would consider its enemy to be the aggressor and take advantage of that determination to disregard the rules of the law of war. Here, too, the result would be a reversion to barbarity.

Even supposing that the problem could be overcome and that the Security Council, thanks to an exceptional political constellation, managed to make a decision which stood unchallenged, other difficulties – no less complex – would arise. Indeed, the theory of the discriminatory application of the law of war is based on the assumption that it is possible to separate the rights from the obligations deriving from this body of law, and that the aggressor state would have all the obligations without any of the rights, while the reverse would hold true for the victim.

This notion, once again, shows a profound misconception of the law of war in general, and of humanitarian law in particular. The purpose of the laws and customs of war is not to confer subjective rights on belligerents without any corresponding obligations, or vice-versa, but to protect the human being through the application of objective sets of rules imposing both rights and obligations on all belligerents.
This is the case for the red cross or red crescent emblem: it protects the medical establishments marked by it, but it also protects the adversary in that establishments thus indicated may not be used for hostile acts. Similarly, the essential aim of the distinction made between combatants and non-combatants is to protect the civilian population – but it also protects the adversary in that civilians know that if they take up arms against the enemy they will jeopardize their immunity. Prisoner-of-war status protects both the prisoner and the adversary because it limits the categories of persons who may lawfully take part in hostilities and then, if captured, claim the protection granted by this status. The same point can be made with regard to other provisions such as the prohibition of perfidy, the protection of bearers of a flag of truce, the respect for a truce or armistice and the maintenance of order and security in occupied territories. It is obvious that rights cannot be separated from obligations without endangering both, and without dismantling the rules. The law of war as a whole is a balance between rights and obligations: if the balance is disturbed, the result is not a unilateral application of the law, but lawlessness and anarchy.

Further, a discriminatory application of humanitarian law would constitute a form of reprisal. Since those directly responsible for planning, launching or waging a war of aggression could not be punished, others within reach – the wounded and sick, prisoners of war, civilian internees and the population of occupied territories – would be punished in their stead. All the arguments already put forward against the use of reprisals directed against persons or property protected by humanitarian law are equally valid here.

But there is also a major, practical obstacle to the discriminatory application of the laws and customs of war. Diplomats and lawyers are sometimes wont to reason as though the law of war had been written for their benefit. With all due respect for these eminent professions, that is not the case. The real addressees, upon whom application or non-application of the rules will depend, are the combatants. What is their situation? Every country expects its soldiers to put up with suffering and hardship, to accept the death of their comrades and be prepared to sacrifice their own lives. At the same time, they are expected to treat wounded and captured enemy soldiers with respect and consideration – hardly an easy matter, under the circumstances. Nevertheless, the rules are generally observed, through a combination of military discipline, a sense of chivalry, concern over the fate of comrades held by the enemy and, perhaps, a humane instinct which has not been entirely extinguished by the horrors of the battlefield. It would, however, be completely illusory to imagine that a soldier would respect the rules of war if he himself were considered an outlaw solely because his country had been labelled an aggressor. No legal argument will persuade a soldier to respect rules when he himself has been stripped of their protection.

It would be just as unrealistic to expect a government to respect the laws and customs of war after being told that it and its citizens were no longer entitled to enjoy the rights stemming from them.
This psychologically untenable situation is the outcome of a fundamental contradiction in terms of formal logic, in that all acts of war committed by the alleged aggressor are considered unlawful, while demanding that the latter respect the distinction between acts that are not prohibited by the laws and customs of war, and those that are intrinsically unlawful because they are committed in violation thereof. If every hostile act is considered a war crime simply because it is committed in the context of a war of aggression, there is no point in demanding respect for the laws and customs of war.

So whatever the legal or moral motives behind it, the theory of the discriminatory application of the law of war leads in practice to the same result as the theory that a war of aggression escapes all regulation – namely unlimited violence.

The principle of the equality of belligerents before the laws and customs of war must therefore be upheld. Its application corresponds to a requirement of humanity, since the principle of humanity demands respect for the victims of war in all circumstances, whatever side they belong to. Furthermore, it meets a requirement of civilization since, as Bluntschli said, ‘the law of war civilizes both the just war and the unjust war, in equal measure’. Finally, it meets a requirement of public order, since only by applying that principle can unlimited violence be averted.

These conclusions are entirely consistent with positive law.

Neither the Covenant of the League of Nations nor the Briand-Kellogg Pact weakened the principle of the equality of belligerents before the law of war. The ‘Committee of Eleven’, formed in 1930 by the League’s Council to study possible amendments to the Covenant to bring it into line with the Briand-Kellogg Pact, expressly acknowledged that the law of war remained applicable in the case of resistance to aggression or the execution of international police measures, whatever name may be given to such operations.90

The Charter of the United Nations likewise contains no provision altering the conditions of application of the law of war in relations between belligerents. Conversely, the Charter gives unqualified confirmation to the principle of the sovereign equality of states,91 of which the principle of the equality of belligerents before the law of war is one application.

The Charter of the International Military Tribunal (Nuremberg International Tribunal), annexed to the London Agreement of 8 August 1945, is certainly the legal instrument that has gone the furthest in condemning wars of aggression, qualifying such a war not only as an unlawful act involving the international responsibility of the state but as an international crime for which those persons participating in its preparation and initiation shall bear individual responsibility. The Charter nonetheless clearly maintained the distinction between crimes against peace, that is the ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances’, on the one hand, and war crimes, that is ‘violations of the laws or customs of war’, on the other. This meant that any acts in conformity with the laws and customs of war would
not be prosecuted, even though they had been committed during a war of aggression.92

The Tribunal strictly applied the distinction between crimes against peace and war crimes. It considered as war crimes only those acts committed in violation of the laws and customs of war whose illegality could be demonstrated through reference to the Geneva or Hague Conventions. On the other hand, the Tribunal allowed the defence to argue that the accused had exercised their rights laid down by *jus in bello*, thus confirming the principle of the equality of belligerents before the law of war.93 The great majority of national tribunals that dealt with war crimes after the Second World War applied the same principles, thereby confirming the autonomy of *jus in bello* with regard to *jus ad bellum*.94

The 1949 Geneva Conventions give twofold confirmation of the principle of the equality of belligerents as regards the application of humanitarian law: by forbidding reprisals directed against persons and property protected by the Conventions,95 and above all by the provisions of their identical first article: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’

This provision underscores the binding force of the Geneva Conventions, whose application may in no way be subject to any judgement as to the legality or otherwise of the use of force, whether such judgement be made by the contending parties or by an international body.96 Their common Article 2 goes on to specify that the Conventions apply ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’.

This interpretation is confirmed by the *Commentary*, published by the ICRC:

> The application of the Convention does not depend on the character of the conflict. Whether a war is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.97

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–7) put an end to all argument by introducing the following provision into the Preamble of Protocol I:

> The High Contracting Parties ...

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict ...98

This provision, adopted by consensus and without any debate or opposition at the Diplomatic Conference,99 must be considered as the authentic interpretation of the Geneva Conventions. It is binding on all states party to the Conventions, whether or not they are party to Protocol I. It also confirms the
autonomy of humanitarian law in respect of *jus ad bellum*. As a result, no government may put forward the excuse that it is the victim of aggression, or advance any other reason linked to the origin or nature of the conflict, in order to dispense with its obligations under international humanitarian law and turn down the ICRC’s offer of services. To do so would be contrary to the letter and spirit of the Geneva Conventions and Protocol I.

Most states which have been involved in armed conflicts since 1945 have claimed that they were exercising their right of legitimate individual or collective self-defence against a war of aggression of which they themselves, or one of their allies, were victim. However, to my knowledge only one of them, the Democratic Republic of Vietnam, drew concrete conclusions regarding the application of humanitarian law and the work of the International Committee. Until the Paris agreements of January 1973 and the repatriation of American prisoners of war, it rejected all offers of services by the ICRC, asserting that as the victim of a war of aggression waged by the United states, Vietnam was not bound to apply the Third Geneva Convention to American prisoners of war, nor obliged to allow the ICRC to carry out on their behalf the activities laid down by the Geneva Conventions. All efforts by the ICRC to help these prisoners were in vain.¹⁰⁰

The government of the Socialist Republic of Vietnam advanced the same argument during the Sino-Vietnamese conflict of February 1979. After protracted discussions it did nevertheless allow the ICRC’s delegates to visit Chinese prisoners of war taken during the conflict, even though it claimed to have been the victim of aggression by the People’s Republic of China.¹⁰¹

However, when it ratified Protocol I, the Hanoi government tabled no reservations over paragraph 5 of the Preamble.¹⁰² It may therefore be considered to have revised its opinion regarding the conditions of application of the Geneva Conventions, and to have adopted the unanimous view of the Diplomatic Conference that no consideration based on the nature or origin of a conflict or on the causes espoused by the contending parties could obstruct the application of humanitarian law.

Only three military operations have been carried out under Chapter VII of the UN Charter:

- the campaign by the United States and its allies in Korea, on the basis of Security Council Resolution 83 (1950) adopted on 27 June 1950;
- the operation by the anti-Iraq coalition to liberate Kuwait, on the basis of Resolution 678 (1990) adopted on 29 November 1990;
- the intervention by NATO forces in Bosnia-Herzegovina, on the basis of Resolutions 816 (1993) and 836 (1993), adopted respectively on 31 March and 4 June 1993, and of many subsequent resolutions.

In none of these cases did the various states concerned, acting on the orders or with the consent of the Security Council, try to use this as an excuse to escape their humanitarian obligations; nor did they advance it as a just cause for rejecting the ICRC’s offers of services.
Conclusions

I do not claim to have examined all possible objections that belligerents might raise to counter the International Committee’s offers of services. That would virtually require a book of its own.

On the other hand, leaving aside those based on circumstantial considerations, I believe I have covered all objections ostensibly based on some kind of legal argument. As we have seen, none of these is acceptable under the terms of the 1949 Conventions.

This is not surprising. After all, the Second World War clearly demonstrated how quick belligerents were to take advantage of the slightest gaps in the law, with devastating consequences.

Hence it is easy to understand why the 1949 Diplomatic Conference set out to produce a universal legal framework applicable in all circumstances, and to close all the loopholes through which belligerents might escape their obligations. In the application of the Conventions the International Committee itself is a cog – small, perhaps, but nonetheless necessary. It must therefore also be able, in all circumstances, to carry out the tasks assigned to it.

3. The effects of offers of services in non-international armed conflicts

If the government of a country engaged in civil war grants its opponents, or claims for itself, the status of belligerent, this recognition of belligerency, as we have seen earlier, entails the application of most of the laws and customs of war and consequently most of humanitarian law; apart from provisions concerning Protecting Powers and certain rules regarding occupied territories, the Geneva Conventions become applicable in their entirety. The International Committee then has the right, as in a conflict between states, to carry out the tasks assigned to it by the Conventions, and its offers of services produce the same effects as those discussed in the context of international conflicts.

In the twentieth century, however, governments have generally refused to recognize the existence of a state of belligerency, even though the circumstances would often have justified doing so.

In the absence of any such recognition, relations between the belligerents will essentially be governed by Article 3 of the 1949 Conventions. With regard to the ICRC’s offers of services, the article’s paragraph 2 states: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ This provision clearly acknowledges the ICRC’s right to offer its services, but does not oblige the parties to a conflict to accept them. The belligerents are expected to examine the offers in good faith – the provision would otherwise serve little
purpose – but they are under no legal obligation to accept them if they believe that they have good reasons for not doing so. The decision is up to each belligerent, which must take responsibility for the consequences of a refusal.

Since the belligerents are not bound to accept the ICRC’s offers of services, there is no need to examine the validity or otherwise of any objections that they might raise. Conversely, the effects of and limits to the ICRC’s right under the Geneva Conventions to offer its services to the parties in conflict, and the effects of any objections raised by either party, do need to be examined.

Generally speaking, three kinds of situation may arise.

First, all the belligerents may accept the Committee’s offers of services, in which case the ICRC can carry out its humanitarian work on both sides, on the basis of Article 3 and any other provisions that the parties might agree to put into effect through special accords or tacit understandings. This is what happened, for example, in the civil wars in Yemen (1962–7) and Nigeria (1967–70).

Second, both sides may refuse its offers of services. The Committee can then do nothing but wait for a favourable opportunity to renew its offers.

Third, the offers of services may be accepted by one side and refused by the other. Would the Committee then be entitled to assist the conflict victims under the control of the side that accepted the offer, despite the objections of the other side?

It is widely held that this question raises no particular problems when the refusal comes from the insurgent side. In that case the ICRC certainly has the right to assist the victims under the control of the government. But what if the side claiming to be the legitimate government opposes any contact between the ICRC and the insurgents, or if the Committee finds itself faced with rival claims to legitimacy by both sides, each seeking to deny the ICRC any contact with the other?

It has been shown above that Article 3 authorizes the International Committee to offer its services to all parties to a conflict and does not give precedence to one side or another.105 This conclusion is in keeping with the general tenor of the article, which confers identical rights and obligations on all parties.

Since the Committee’s offers of services are in effect no more than a proposal to co-operate for the benefit of the victims of war, it cannot be argued that Article 3 allows the ICRC to offer its co-operation to each of the parties but does not authorize it to co-operate with them if the offer is accepted. The right to propose co-operation presupposes the right to co-operate. In other words, each of the parties to a conflict has the right to accept or refuse, for itself, the Committee’s offers.

To carry out its work the Committee needs no other authorization than that of the party to which it has made an offer of services. The consent of the other party is not required.
If its offer is accepted by one side and rejected by the other, the International Committee is therefore entitled to carry out its assigned tasks in co-operation with the former, notwithstanding any objections by the latter; this holds true whatever the respective legal status of the parties accepting or rejecting the offer.106

However, there is certainly a risk that the government in power might contest this standpoint and invoke its authority under domestic law to forbid the ICRC to carry out any activities in areas not under its control. We must therefore clarify the limits to the powers that Article 3 grants to the ICRC.

The side claiming to be the legitimate government could not raise any valid objections to the ICRC assisting people who had fled from the combat zone into a neighbouring country. Once they had crossed the border these people would be beyond the jurisdiction of the country at war, both in law and in fact. The consent of the government of the state on whose territory they had sought refuge would be sufficient.

Similarly, there would be no justification for the side claiming to be the legitimate government to oppose the provision of medical supplies to members of dissident forces abroad, since Article 3 specifies that ‘the wounded and sick shall be collected and cared for’ and since these supplies, by their very nature, cannot be put to other uses.

But what of other relief supplies, such as food, clothing, tents, blankets – things which the victims of the conflict might need most urgently? Without any proper control over the distributions, there could be no guarantee that such items would not be used for the benefit of the combatants. This leads to the question of the supervision of distributions – but how could effective supervision be ensured without the presence of the ICRC?

Moreover, how could the Committee give protection and assistance to government soldiers who had been taken prisoner by the insurgents, if it were unable to send in a delegate to see them?

So in the final analysis, the question is whether a mission can be sent into areas not controlled by the government. Is the consent of the insurgents sufficient, or must the Committee also obtain the permission of the side claiming to be the legitimate government?

If the latter consents to, or at least tolerates such a mission, the ICRC has every reason to feel satisfied; its work is made a great deal easier. But what if that consent is denied, or if the authorities make it clear they will refuse if the ICRC asks permission? Can the Committee decide to go ahead anyway?

Two situations are possible.

Either:

a) the areas controlled by the insurgents are entirely surrounded by government-held territory, in which case the ICRC has no choice but to pursue its negotiations with the government in the hope of persuading it to change its mind. On no account would the Committee organize clandestine missions into rebel zones from government-controlled areas;
b) there is some means of entering rebel-held territory without going through areas held by the government.\(^{107}\) If so, would the ICRC be entitled to use that access route in order to work in areas outside the government’s control?

This is a particularly sensitive issue. Obviously, the ICRC must co-operate with states – thus with the governments that represent them – in order to implement humanitarian law. It therefore cannot lightly disregard a government’s express wishes. On the other hand, it would be unacceptable for the victims of war to be deprived indefinitely of assistance which is available, simply because their government prohibits any relief operations on a part of the national territory that it no longer controls. As the representative of Mexico said at the Diplomatic Conference in 1949, ‘…the rights of the state should not be placed above all humanitarian considerations’.\(^{108}\)

The question has to be answered in the light of Article 3. As pointed out above, this article gives identical rights and obligations to all parties to a conflict and authorizes the ICRC to offer its services to them all, without favouring one belligerent over another. Since it is entitled to offer its services to each party, the ICRC also has the right to carry out its activities on the territory controlled by any party that accepts the offer, whatever position is adopted by the other party, for the right to offer its services presupposes the right to take the corresponding action if the offer is accepted.

When the situation of the victims so demands and they can be reached without crossing territory controlled by the party that claims to be the legitimate government, the International Committee is therefore entitled to perform its humanitarian activities in areas outside that party’s control without necessarily having to obtain its consent.

Such an operation, based on a provision of a Convention to which the state in question is party, would not constitute a violation of national sovereignty. As the Permanent Court of International Justice has pointed out, ‘the right of entering into international engagements is an attribute of state sovereignty’.\(^{109}\) If it is not necessary to obtain the prior consent of the government of a country engaged in civil war, the reason is not that the International Committee considers it can do without it, but that the state in question has already given its consent by becoming party to the Geneva Conventions.

Nor could that operation be seen as interference in the internal affairs of the state: a conflict that comes within the scope of Article 3 cannot, with regard to its humanitarian implications, be considered a purely internal affair.

The risk that it might provoke a strong protest from the government in power nonetheless remains. The ICRC would therefore engage in such an operation only after very cautious consideration, and only if the situation of the victims made it imperative.

The practice of the International Committee, which we shall now consider, supports these conclusions.
The first time the ICRC resolved to send a mission to an area outside the control of the government, without its prior consent, was during the Algerian war (1954–62). The Committee was quick to get in touch with leaders of the Algerian rebellion, and sought to carry out the same activities in aid of French soldiers held by the insurgents as it did for rebel fighters captured by the French army.

In January 1958 representatives of the National Liberation Front told the Committee that its delegates could visit four French soldiers captured a few days earlier; the visit would take place on the border between Algeria and Tunisia, but on Algerian territory. The ICRC decided to accept the proposal, which opened up new prospects for its efforts to protect French prisoners, but also decided that it would not ask the permission of the French government. Instead, it would ‘inform the French authorities’, and suggest they ‘turn a blind eye to a possible discreet crossing of the border’. The visit took place on 30 January 1958, and the four prisoners were freed later that year on 20 October.110

The Committee made similar decisions during the uprisings in Iraqi Kurdistan (1974), Eritrea and southern Angola.

Examination of these cases shows that the ICRC acted with extreme prudence: it decided to send missions to rebel-held areas without the government’s prior permission only when it felt that it had exhausted every possibility of reaching an agreement with the authorities, or had become convinced that rather than discuss such operations, the government would prefer to know nothing about them.

The records also show that in each of these instances, the most pressing aim of the mission was to ensure protection and assistance for government prisoners held by the insurgents.

* * *

But are these conclusions not challenged by Article 18 of Protocol II, at least as regards relief operations for the civilian population?

It would appear so. The article says:

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.111
Paragraph 1 covers national relief societies. Only paragraph 2 applies to international relief operations for which the ICRC might take the initiative — but subjects such operations to the approval of the High Contracting Party concerned.

This provision raises, however, a delicate problem of interpretation that immediately comes to mind. In contested situations — thus by definition any situation covered by Protocol II — which body is entitled to give or withhold that vital consent in the name of the High Contracting Party? Can each party to an internal conflict give consent for the areas it controls? Or is the legal government alone entitled to give its consent for the whole of the national territory, including areas which it does not effectively control? But who is to determine which is the legal government whenever there are two parties that claim that position, as was the case in the Spanish and Chinese civil wars and in many other more recent conflicts?

Unfortunately, the preparatory work gives no guidance on this point. While some participants were determined to limit the prerogatives of international relief agencies, others were just as determined to oppose any provision which might obstruct the work of such organizations. Furthermore, it was only at the very last minute that the Diplomatic Conference inserted the phrase ‘subject to the consent of the High Contracting Party concerned’, in place of the words ‘subject to the consent of the Party or Parties concerned’ which had been adopted in the Commission. The new wording was adopted without the slightest discussion likely to explain its meaning, so that it is impossible to know whether the Conference merely wished to make a cosmetic change, designed to allay any misgivings without basically modifying the sense, or whether the intention was indeed to alter the provision radically.

For its interpretation the context must therefore be examined.

Generally speaking, the term ‘High Contracting Party’ in the Geneva Conventions and Additional Protocols means the state as a legal entity viewed in terms of its continuity and permanence, regardless of changes of government and policy or of the upheavals inherent in the situations to which the Conventions and Protocols apply. This is certainly how the term is understood in provisions concerning adherence to these treaties, as well as those applicable in time of peace.

As a legal entity, the state expresses itself through its official organs. In the normal course of international life, the executive represents the state towards the outside world. Thus it would be for the legal government — and it alone — to give or withhold the consent required in Article 18, paragraph 2.

This is how some delegations wished to interpret the provision, and this interpretation must be considered as a first hypothesis. However, it does give rise to a number of difficulties that cannot be glossed over.

With the exception of Article 18, paragraph 2, all the substantive provisions of Protocol II create identical rights and obligations for both sides in a conflict. The Diplomatic Conference’s rejection of draft Article 5, which stressed this point, in no way refutes it, for it is a natural conclusion based on
the scope of those obligations. Did the Diplomatic Conference really intend deviating from the principle of the equality of the belligerents only in respect of international relief actions, even though it risked jeopardizing the effective application of Protocol II, since a rebel movement was unlikely to feel bound by a treaty that it had good reason to consider discriminatory? Hardly.

Moreover the Conference, though fully aware of the implications of Article 3 for international relief operations, was careful to point out that Protocol II develops and supplements Article 3 common to the 1949 Geneva Conventions ‘without modifying its existing conditions of application’. Is it conceivable that the Conference would deliberately have adopted two rules that contradict each other? Again, hardly – particularly as the argument of lex posterior is of no relevance here, since the validity of Article 3 is confirmed in the first article of Protocol II.

But that is not all. If the Conference had really wished to make international relief operations subject to the consent of the legal government alone, it had it in its power to say so, clearly and unambiguously. If it did not do so, it is because opinions were divided on this point. Several delegations would have opposed any such wording with as much tenacity as others rejected the proposals approved by Commission II.

The truth is that reliance upon the concept of ‘legal government’ creates more problems in international law than it solves.

A crucial point to bear in mind is that the situations covered by Protocol II are, in the true sense, extraordinary: they are situations of armed conflict which preclude the normal running of the state, and in which rebel armed forces or organized armed groups exercise such control over part of the national territory that they are able to ‘carry out sustained and concerted military operations and to implement [the] Protocol’. In other words, they are situations in which the legitimacy of the government in power is undermined in foro domestico and its authority non-existent in part of the national territory. Can international legislation be based on a notion which appears clear in normal circumstances, but which becomes blurred when faced with exactly the kind of situation it was designed to deal with?

The very concept of legal government is here called into question. Indeed, in most cases it is not a question of insurgents waging an armed struggle against a government whose legality they nevertheless recognize, but of two entities challenging each other for legitimacy.

Any civil war presupposes fundamental damage to the national fabric, which cannot be explained away in the legalistic terms of the seventeenth century. Non-participant states are divided in their loyalties and recognize one side or the other according to their interests or ideological inclinations, without the slightest regard to questions of legality. In the closing days of the twentieth century it is impossible to reason in the way that people did at the time of Grotius. If the concept of legitimate government could be said to have any objective meaning in a homogeneous society, such as existed in Europe at the time of the Ancien Régime, it certainly cannot today. It is plain that inter-
national law is incapable of providing an objective definition of a legitimate government. Nor can that legitimacy be defined in terms of national law, if only because of the many governments that are recognized internationally after coming to power by force rather than by any lawful process. An examination of state practice shows that current international law is not founded on the concept of legitimacy but on the actual possession and exercise of governmental authority. When a situation such as those covered by Protocol II arises, it is precisely because that authority can no longer be exercised in part of the national territory.

On looking at various internal conflicts – the Spanish Civil War, the conflict which afflicted Chad for longer than one cares to remember and the wars in China and Yemen, not to mention hostilities of a mixed nature such as the Vietnam War and the conflict that tore apart Cambodia from 1979 until the Paris peace agreement of 23 October 1991, it can be seen that some states recognize one party to the conflict as the legitimate government, whereas other states recognize the adverse party. The international community is divided just as much as national communities, and the proclaimed consensus which produced Article 18, paragraph 2, evaporates. As the expression of an agreement, it is reminiscent of the answer made by King Francis I of France to the envoys of Charles V, the Holy Roman Emperor, who had come to relay their master’s demand that Francis renounce his claim to the Duchy of Milan: ‘CE que veult mon frère Charles, je le veulx aussi’ [‘Whatever my brother Charles wants, I wish for also’]. Pleased with the success of their mission, the envoys reported that agreement had been reached and that peace would be preserved. But what Francis had really meant was: ‘If the Emperor has his eyes on Milan, then so do I!’ War broke out soon after …

The Diplomatic Conference could hardly have been unaware of these contradictions. Are we, then, seriously to believe that it wished to force the International Committee and other impartial humanitarian bodies to weigh up the rival claims of the parties in conflict in order to decide which was the legitimate government whose consent had to be obtained? Would this not be the surest way of plunging these agencies into the political controversies they have to avoid at all costs, and encourage interference in the internal affairs of the country in question – something which the Conference had strenuously tried to rule out?

It stands to reason that states cannot maintain the decentralized processes giving them every liberty to decide which party to a conflict they will recognize as the legitimate government, and at the same time expect humanitarian organizations to behave as though there were some form of centralized procedure for objectively determining the legitimate government in a country wracked by civil war.

Finally, it is common knowledge that a great many states, large and small, supply arms and ammunition to the various parties involved in countless grievous internal conflicts throughout the world, heedless of the rules of law
and without any consideration for the governments having to contend with these situations. Can the same states conceivably have wished to grant those governments the right to veto relief supplies, thereby threatening the humanitarian work of organizations whose sole concern is to alleviate the war victims’ plight? In other words, free passage for guns and bombs, but stringent checks on humanitarian relief! Surely not. Such a degree of cynicism and hypocrisy is impossible to believe of a Conference whose very purpose was to reaffirm and develop humanitarian law.

Clearly, any interpretation of Article 18, paragraph 2, which identifies the consent of the ‘High Contracting Party’ with that of the ‘legal government’ of the country in question creates more difficulties in situations covered by Protocol II than it solves.

There must therefore be another interpretation. Bearing in mind that Protocol II applies to conflict situations in which two organized factions are fighting for power, each controlling part of the national territory, it must be assumed that each party to the conflict has the right to give or withhold its consent to relief operations within the territory it effectively controls.116 This solution does not escape all criticism, but it at least has the merit of being in keeping with the general tenor of Protocol II, of avoiding contradiction with Article 3 of the 1949 Conventions and of responding to the actual situation of countries engaged in the kind of internal conflicts to which Protocol II applies. It also takes account of the regrettably anarchical state of international relations.

Above all, this conclusion does not risk embroiling the International Committee and other humanitarian bodies in political controversies over the legitimacy or otherwise of the conflicting parties, an involvement which would destroy such organizations altogether.

But whatever interpretation is given to the closing words of Article 18, paragraph 2, of Protocol II, two points should be kept firmly in mind.

In the first place, the International Committee’s universally recognized right of humanitarian initiative, which is confirmed in Article 3 of the Conventions, is and remains fully valid. As explicitly acknowledged by the Diplomatic Conference, its conditions of application are unchanged.117 There is consequently no question of invoking Article 18, paragraph 2, or the argument of *lex posterior* to restrict the ICRC’s field of activity under Article 3.

Secondly, it must be remembered that the purpose of Article 18 is ‘to facilitate the provision of assistance to the civilian population when their survival [is] threatened’.118 Before granting one or other of the warring parties the right to give or withhold its consent to a relief operation, the article places them under the obligation to allow such operations to be carried out whenever the population is suffering undue hardship; the use of the mandatory ‘shall be undertaken’ leaves no room for doubt about this. Whatever meaning is attributed to the final phrase of Article 18, it cannot be advanced as an argument for denying assistance to the civilian population that needs it. This would be a flagrant violation of the law, all the more so since Protocol II
expressly demands that the wounded and sick be given the care they need, and repeats that starvation of civilians as a method of combat is prohibited.

If there are real and urgent needs, the victims must receive whatever assistance their condition requires. If the resources of national relief agencies are insufficient – and they are almost certain to be lacking in a country ravaged by civil war – international help must be accepted.

* *

The International Court of Justice broadly confirmed these conclusions in its judgment of 27 June 1986 in the case of military and paramilitary activities in and against Nicaragua.

The Court declared without hesitation that assistance of a strictly humanitarian nature could not be considered as interference in a state’s internal affairs:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.119

After recalling the Fundamental Principles of the Red Cross, in particular those of humanity and impartiality, the Court expressed the view that respect for the principle of impartiality was an essential condition for the legitimacy of humanitarian assistance:

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.120

In the eyes of the Court, the wrongful act lay not in the fact that humanitarian aid was given to the rebels without the consent of the government in power, but that assistance had been given to only one side – which side was not the point at issue.

Notes

1 Third Convention, Articles 73, 122 and 126; Fourth Convention, Articles 109, 137 and 143.
3 The author has even had the dubious privilege of hearing the representative of a belligerent state declare solemnly, one hand on the Geneva Conventions, that his government was unable to apply the Conventions ... because the country was at war!

Article 2, paragraph 1 of the Hague Convention (II) with respect to the Laws and Customs of War on Land, of 29 July 1899, states: ‘The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.’ Similarly, Article 24 of the Geneva Convention of 6 July 1906 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field states: ‘The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them.’ Article 1 of the Resolutions of the October 1863 Conférence also specifies ‘in time of war’.

Hague Convention (III) relative to the Opening of Hostilities, of 18 October 1907. The term jus in bello means all rules governing relations between belligerents.

For an account of these events see above, Book I, Chapter VII, Sections 4 and 7, pp. 137–40 and 157–62.

XVe Conférence internationale de la Croix-Rouge, Tokyo, October 1934, Document no. 10, Application, en cas d’hostilités non accompagnées d’une déclaration de guerre, des Conventions de Genève et de la Convention relative au traitement des prisonniers de guerre, ICRC, Geneva, 1934.

Resolution XXXVIII, Quinzième Conférence internationale de la Croix-Rouge tenue à Tokyo du 20 au 29 octobre 1934, Compte rendu, pp. 261–2.


The ICRC and the Protection of War Victims

18 Goodrich & Hambro, Charter of the United Nations, p. 68.
19 Interhandel Case, Judgment of 21 March 1959, I.C.J. Reports 1959, p. 25. In its judgment of 27 June 1986 in the case concerning military and paramilitary activities in and against Nicaragua, the International Court of Justice confirmed that the area coming within a state’s exclusive domestic jurisdiction was defined by international law: ‘A state’s domestic policy falls within its exclusive jurisdiction, provided of course it does not violate any obligation of international law’, I.C.J. Reports 1986, p. 131.
27 Third Convention, Article 126; Fourth Convention, Article 143.
28 Third Convention, Article 70; Fourth Convention, Article 106.
29 Third Convention, Article 122; Fourth Convention, Articles 137 and 138.
30 Third Convention, Article 73; Fourth Convention, Article 109.

32 Some writers maintain that this is a tacit clause according to which treaties are concluded on the implicit condition that matters will stay as they are, thereby implying that the binding force of a treaty will be affected by any change of circumstances that substantially modifies the rights and obligations of the contracting parties. This artificial hypothesis is rejected outright by most writers since, under the guise of interpretation, it threatens to deprive the contractual link of any meaning.


34 Common Article 2.

35 Paragraph 5 of the Preamble to Protocol I.

36 Common Article 1.


38 Oppenheim, *International Law*, vol. II, pp. 602–5. *Debellatio* is a unilateral means of ending a conflict, usually when one of the belligerents is incapable of continuing to fight because its armed forces have been destroyed and its entire territory has been occupied; it generally leads to the vanquished state’s dismemberment or annexation.


41 Reprisal should be understood as an unlawful act justified by the fact that it is taken by a state in response to another unlawful act, as a means of obtaining redress.


43 Rousseau, *Droit international public*, vol. I, pp. 140–1. It is obvious that reprisals cannot be lawful if they are taken against persons or property against whom or which reprisals are forbidden.

44 During the Anglo-Canadian raid on Dieppe on 19 August 1942, German prisoners had been handcuffed on the battlefield. The British government admitted this, claiming military necessity as justification, and referred to Article 1 of the 1929 Prisoners-of-War
Convention which allowed certain exceptions to the Convention’s provisions. Germany claimed that the Convention had been violated and ordered, as a retaliatory measure, more than a thousand British and Canadian prisoners of war to be handcuffed for twelve hours a day. The two Allied governments retaliated with similar measures, stating that their reprisals would cease as soon as Germany stopped handcuffing their soldiers. Despite the persistent efforts of the Protecting Power and the ICRC, it took more than a year to halt these degrading forms of treatment. Report of the International Committee of the Red Cross on its Activities during the Second World War, vol. I, pp. 368–70.

45 ‘[Reprisals] have often been used as a convenient cloak for violations of International Law’, Oppenheim, International Law, vol. II, p. 562.
47 First Convention, Article 46; Second Convention, Article 47; Third Convention, Article 13, paragraph 3; Fourth Convention, Article 33, paragraph 3.
48 Protocol I, Articles 20; 51, paragraph 6; 52, paragraph 1; 53 (c); 54, paragraph 4; 55, paragraph 2; and 56, paragraph 4.
49 Commentary, vol. I, p. 345. Professor Stone believes that Article 13, paragraph 3, of the Third Convention leaves the right of reprisals in response to violations of the Convention itself intact, and bans only reprisals directed against prisoners of war because of violations of other rules of the law of war: ‘Medical or scientific experiments are prohibited, as are also measures of reprisal, for example, for breaches of the laws of war by the opposing belligerent states other than breaches of the Convention’ (Stone, Legal Controls of International Conflict, p. 656). With all the respect due to the eminent professor of the University of Sydney, I cannot see by what possible stretch of the imagination the clause ‘measures of reprisal against prisoners of war are prohibited’ can be interpreted as allowing reprisals for the purpose of punishing a violation of the Convention itself. The text is clear and does not allow for any exception. Moreover, the interpretation offered by Professor Stone is contradicted by the preparatory work. The 1929 Diplomatic Conference had in fact received a British proposal for the banning of reprisals against prisoners of war, except in cases where these were intended as a response to a violation of the Convention itself. This proposal was unanimously rejected. The reports of Sub-Commission I of Commission 2, and of Commission 2 itself, both stressed that the prohibition of reprisals against prisoners of war was absolute and allowed no exception (Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre, réunie à Genève du 1er au 27 juillet 1929, Imprimerie du Journal de Genève, Geneva, 1930 (hereinafter Actes 1929), pp. 448–52, 464, 530–2 and 634). It was this same prohibition, couched in identical terms, which the 1949 Diplomatic Conference included in Article 13, paragraph 3, of the Third Convention. Under the circumstances, one is reminded of the rules of interpretation which the Permanent Court of International Justice formulated in respect of Article 380 of the Treaty of Versailles: ‘…the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.’ (Permanent Court of International Justice, ‘Case of the S.S. Wimbledon, Judgment of August 17th, 1923’, Collection of Judgments, Series A, no. 1, pp. 15–42, esp. p. 24–5).
52 On the effects of the absence of reciprocity on treaty obligations, see the following: Brownlie, Principles of Public International Law, pp. 615–16; Guggenheim, Traité de Droit international public, vol. I, second edition, pp. 226–9; Lord McNair, The Law of Treaties,
The Effects of Offers of Services

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54 The same interpretation is given in *Commentary*, vol. I, p. 25.

55 First Convention, Article 46; Second Convention, Article 47; Third Convention, Article 13, paragraph 3; Fourth Convention, Article 33, paragraph 3; Protocol I, Articles 20; 51, paragraph 6; 52, paragraph 1; 53(c); 54, paragraph 4; 55, paragraph 2; and 56, paragraph 4.


57 The opposite conclusion would imply that a government which rejected the ICRC’s offer of services had the power of veto over the Committee’s relations with other belligerents. This would be in flagrant contradiction to the principle of legal equality among states that underlies all international law.

58 ‘The ICRC’s impartiality having been sufficiently established by an identical offer of services to both parties, the Committee is within its rights to work on the one side which allows it to’, ICRC Archives, document SP 673b, 5 December 1968, pp. 1–2.

59 For further details see above, Book I, Chapter VII, Section 6, pp. 144–5.

60 This was made clear in the memoranda sent to the UN Secretary-General on 12 January and 8 February 1951, and published in *Le Comité international de la Croix-Rouge et le conflit de Corée: Recueil de documents*, ICRC, Geneva, 1952, vol. I, pp. 82–5.


64 Wilhelm, *Le caractère des droits*, p. 15.

65 For a detailed analysis of this question, see the above-mentioned study by René-Jean Wilhelm, *Le caractère des droits*.

66 Neither the argument of *lex specialis* nor that of *lex posterior* may be invoked here, since a subsequent treaty would be inherently flawed, as being incompatible with the earlier one. In order to take precedence over a prior treaty, the subsequent one would at least have to have been validly concluded. The same is true for a special treaty with regard to a general treaty.


68 Thousands of others suffered restrictions and punishment for having refused.


70 The designation of protected persons varies according to the Convention: thus, the First Convention refers to ‘Wounded and sick, as well as members of the medical personnel and
chaplains’, the Second Convention to ‘Wounded, sick and shipwrecked persons, as well as members of the medical personnel and chaplains’, the Third Convention to ‘Prisoners of war’, and the Fourth Convention to ‘Protected persons’.


73 A summary of the main positions is given in Meyrowitz, *Le principe de l'égalité*, pp. 77–140.


75 This is, for example, the purpose of criminal law at national level, and of rules governing international responsibility under international law.

76 With regard to national law, the maxim *male captus, bene judicatus* may be mentioned; this holds that a criminal court may declare itself competent to judge an accused person even though he or she may have been brought before it by unlawful means, such as seizure in another country. At international level, it can be said that the occupation of territory – which is a material fact – has legal effects, even when the occupation has no valid legal basis and results from a pure and simple act of force. Similarly, there is the relative indifference of international law towards the position of a country’s government in terms of that country’s constitutional law. Provided that it exercises *de facto* control over most of the national territory and its population, a government will generally be recognized internationally as legitimate, even if it came to power by unlawful means. Thus, the international legal effects of an unlawful act committed in *foro domestico* usually go unchallenged. The Tobar Doctrine, which formulated the principle that states should not recognize a foreign government established by force, was never acknowledged outside the Americas and did not enjoy any lasting application.

77 In a certain sense, the whole theory of the discriminatory application of the law of war is based on the premise (a false one, in my opinion) that *jus in bello* grants subjective powers and rights to belligerents. This is not the case. The role of the law of war is not to confer powers or rights but, on the contrary, to set limits on the belligerents’ freedom of action; this was confirmed in the arbitral award of 2 August 1921 in the case of the cession of
vessels and tugs for navigation on the Danube: ‘International Law as applied to warfare is a body of limitations, and is not a body of grants of power’, *Reports of International Arbitral Awards*, vol. I, United Nations, New York, 1948, p. 104. The powers usually referred to as ‘the rights of belligerents’ are strictly speaking nothing other than the exercise of state sovereignty within the limits imposed by the law of war (a view also expressed by Schwarzenberger, *International Law*, pp. 63–5). If that were not so, the absence of rules in a specific domain would result in an absence of powers, and not, as in fact the case, an absence of limits imposed on the belligerents’ freedom of action.


80 Article 7 of the Annex to Resolution 3314.


83 Article 27, paragraph 3.

84 Wright, ‘The outlawry of war’, p. 370.


89 Article 2, paragraph 1. The fact that none of the provisions of the Charter supports a discriminatory application of the laws and customs of war must be seen in the light of the many provisions authorizing, or imposing, discrimination towards the aggressor in relations between third countries and the belligerents: the maxim of statutory interpretation *expressio unius est exclusio alterius* confirms the view that the authors of the Charter had no intention of weakening the principle of the equality of belligerents before the laws and customs of war, and did not do so.


91 The judgement of the Nuremberg Tribunal is reproduced in the *American Journal of International Law*, vol. 41, no. 1, January 1947, pp. 172–333. Of particular note is the fact that the Tribunal refused to convict Admirals Dönitz and Raeder for conducting all-out submarine war (which included torpedoing Allied and neutral merchant ships and abandoning the survivors), on the grounds that the illegality of these acts with regard to the laws and customs of war had not been sufficiently established (pp. 304–5 and 308). The Tribunal thus acknowledged that the rules of *jus in bello* worked not only against the accused, but also in their favour: they could not be convicted for hostile acts whose illegality had not been proved, even though these acts had been committed during a war of aggression.

94 Numerous examples are given in Meýrowitz, *Le principe de l’égalité*, pp. 62–76.

95 Convention I, Article 46; Convention II, Article 47; Convention III, Article 13, paragraph 3; Convention IV, Article 33, paragraph 3.

Commentary, vol. I, p. 27.

Protocol I, paragraph 5 of the Preamble. Under Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties of 23 May 1969, the preamble is an integral part of any treaty.


The position of the Hanoi government has been stated many times, notably in Document CDDH/41 submitted on 12 March 1974 to the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Official Records CDDH, vol. IV, pp. 177–88). A summary of the negotiations between the ICRC and the government of the Democratic Republic of Vietnam is given in the study by Michel Barde, op. cit., as well as in the work by Professor Jacques Freymond, Guerres, Révolutions, Croix-Rouge, Graduate Institute of International Studies, Geneva, 1976, pp. 85–94. The Hanoi government also referred to the reservation it had announced concerning Article 85 of the Third Convention and relating to the treatment of war criminals.


See above, Chapter IV, pp. 416–22.


The existence of an access route via a neighbouring state would not be enough. The authorities of that state would have to consent to its being used: the ICRC would not send delegates or relief supplies across the territory of a neighbouring country without its government’s permission.


Procès-verbaux du Conseil de la Présidence, 23 January (pp. 3–4) and 30 January 1958 (pp. 2–3); ICRC Archives, file 210 (12–15); Press releases nos. 636 of 3 February and 657 of 20 October 1958.

Emphasis added. For the legislative history of Article 18 of Protocol II, the following documents should be consulted: Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva,


113 Article 1, paragraph 1, of Protocol II.

114 Article 1, paragraph 1, of Protocol II.

115 ‘The question of respect for national sovereignty was fairly straightforward when a legally recognized state was in conflict with an opposition party, but it became far more complex when there were two parties involved each of which was recognized by a number of other states’, as the Soviet delegate Krasnopeev rightly remarked, Official Records CDDH, vol. XII, p. 353 (Document CDDH/II/SR.88, paragraph 46).


120 Ibid., p. 125.
PART THREE

THE PROTECTION OF WOUNDED AND SICK MILITARY PERSONNEL IN WAR ON LAND

Soldiers are citizens of death’s grey land.
Siegfried Sassoon,
Dreamers, 1918
INTRODUCTION

The Red Cross was born of compassion for the plight of the wounded soldiers left to die on the battlefield of Solferino. Over the years, in one conflict after another, the International Committee of the Red Cross itself has gradually extended its activities to other war victims – able-bodied prisoners of war, and civilians in distress – but it has never lost interest in those with whom it was first concerned.

As a neutral intermediary between the belligerents, the ICRC naturally concentrates on helping wounded and sick military personnel who have fallen into enemy hands. Under Article 14 of the First Geneva Convention of 12 August 1949 they are prisoners of war and must be treated as such. Most of the ICRC’s activities on their behalf therefore take place as part of the protection to which prisoners of war are entitled, and will be examined within that framework. There are, however, activities that apply equally to wounded and sick military personnel collected by their own armed forces, or in enemy hands, or as yet unaccounted for.

Humanitarian aid makes no distinction in seeking to alleviate distress. Yet for clarity’s sake these activities will be considered under three headings:

- protection of wounded and sick military personnel against the effects of hostilities;
- efforts to trace wounded, sick and missing military personnel;
- relief operations.

These are dealt with in the following three chapters.
CHAPTER I

THE PROTECTION OF WOUNDED AND SICK MILITARY PERSONNEL AGAINST THE EFFECTS OF HOSTILITIES

The purple testament of bleeding war.

1. Introduction

The Geneva Convention of 22 August 1864 declared, in Article 6, that ‘Wounded and sick combatants, to whatever nation they may belong, shall be collected and cared for’. This is the underlying principle of the entire Convention, and indeed of the whole of the Law of Geneva.

However, for wounded or sick members of the armed forces to be collected and given the treatment their condition requires, they must be shielded from the effects of hostilities and those who seek to help them must not come under fire.

How, then, are wounded and sick military personnel to be protected? This question is crucial, for it is no good going to the rescue of the wounded, whether friend or foe, if they then remain exposed to the violence of war.

Clearly, the principle involved here is that of the inviolability of wounded and sick military personnel and of medical personnel and equipment. But how far does their inviolability extend, and what can the International Committee do to help ensure that it is respected?

As a humanitarian institution, the ICRC cannot confine itself to reminding parties to a conflict of a legal principle, however high-minded. It also wants to see that principle put into practice.

Furthermore, two particular cases of implementation of the principle of inviolability of the wounded and sick merit special attention:

- *ratione loci*: hospital zones and localities, and
- *ratione temporis*: truces and evacuations.

This chapter will therefore be divided into three sections: the first will consider the principle itself; the second, hospital zones and localities; and the third, truces and evacuations.

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The Protection of Wounded and Sick Military Personnel

2. The principle of immunity of wounded and sick military personnel, and of medical personnel and equipment

The principle of immunity of wounded and sick members of armed forces is laid down by Article 12 of the First Geneva Convention of 12 August 1949, which states: ‘Members of the armed forces ... who are wounded or sick shall be respected and protected in all circumstances.’ The whole Convention rests on this fundamental principle that military personnel compelled by wounds or sickness to lay down their arms may not be attacked, but must be respected and protected, to whichever party they may belong.

The same principle is expressed by Article 10 of Protocol I, which restates the law in force. It reads:

All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

With regard to non-international armed conflicts, the immunity of wounded and sick combatants is laid down in Article 3 of the 1949 Conventions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.

The same article provides that ‘The wounded and sick shall be collected and cared for’.

This principle is confirmed by Article 7 of Protocol II, which reproduces almost word for word the text of Article 10 of Protocol I, as follows:

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

The principle that wounded and sick military personnel are inviolable is thus firmly rooted in treaty law. It applies to international and non-international conflicts alike.

This principle imposes two kinds of obligations upon the belligerents, which are expressed in the injunction to ‘respect’ and ‘protect’ as laid down by the Conventions and Protocols. The first obligation, respect, is the duty to refrain from certain acts; it forbids attacks on, or other acts of violence against, the wounded and sick. The second obligation, protection, is a duty to
act. It requires the belligerents to take all precautions in attack and defence so as to avoid exposing wounded and sick military personnel gratuitously to danger; to remove them from the fighting and evacuate them; and to protect them from theft and pillage.

However, the wounded and sick cannot be given the protection that is their due, or be collected and cared for, unless medical personnel are likewise respected and medical installations are spared. The immunity of medical personnel and installations from attack is therefore a corollary of the principle that the wounded and sick in armed forces are inviolable. Provision is made for this immunity in international armed conflicts by Articles 19 to 35 of the First Convention.

In non-international armed conflicts, the immunity of medical personnel and installations follows logically from the obligation of either party to collect and care for the wounded and sick. If one side attacks the other side's medical personnel or prevents them from carrying out their errands of mercy, obviously it is contravening that obligation. But immunity is not expressly laid down in the minimal set of provisions contained in Article 3. The regrettable consequences of this omission soon became evident, and the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law took care to remedy it. Article 9 of Protocol II accordingly stipulates that:

Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

For medical personnel to be able to do their job properly it is not enough to protect them against the hazards of battle; the belligerents must also refrain from obstructing their work. The most common impediment of all, and the most likely to bring the work of medical services to a standstill, is captivity. If doctors, medical orderlies and nurses are thrown into camps and fortresses pell-mell with prisoners of war, they can do nothing for the wounded lying on the field of battle.

This raises the question of the retention of medical personnel who fall into enemy hands.

The 1864 Conference settled the issue in the clearest possible way: it ruled that medical personnel were not to be taken prisoner; that even under enemy occupation, they must be freely able to continue their work of tending the wounded and sick; and that when their care was no longer required they were to be handed over to the outposts of their own armed forces.¹

In the two world wars, however, the belligerents found it necessary to retain some or all captured medical personnel to look after prisoners of war of their own nationality. In some cases the warring parties came to an agree-
ment on the number of doctors, medical orderlies and nurses – in proportion to the total number of prisoners – to be retained.2

This kind of solution was endorsed by the 1949 Conference after lively and fertile debate. Thus, Article 28 of the First Convention states that:

Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong.

The article also defines the facilities to be granted to medical personnel retained to tend prisoners of war. Medical personnel not required for that purpose must be returned to their own side's armed forces as soon as a road is open for their return, in accordance with Article 30, paragraph 1:

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

These provisions apply ipso jure only to international armed conflicts. In situations of internal conflict, the belligerents are under no obligation to set medical personnel free even when they are not needed to tend military and civilian prisoners.

Captivity, however, is not the only possible obstruction; wounded and sick members of the armed forces are likely to be left to their fate if the very people whose task is to collect and care for them are liable to prosecution for so doing. The protection of military wounded and sick necessarily depends on respect for the principle of neutrality of medical care.

Such care is protected by Article 18, paragraph 3, of the First Convention: 'No-one may ever be molested or convicted for having nursed the wounded or sick.'3 This rule is confirmed by Article 16, paragraph 1, of Protocol I: 'Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.'

Do these provisions also protect the doctor's duty to preserve the confidentiality of his patients' medical history? If they do not, wounded or sick persons may have to forgo necessary medical attention for fear of being reported to the enemy.

The 1949 Conventions are silent on this point.4 The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law tried to settle the question, but did so in a way that
protects the medical services only from investigation and prosecution by the adverse party. Thus Article 16, paragraph 3, of Protocol I stipulates that:

No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

In other words, if the law were to require compulsory notification of suspect wounds, medical confidentiality would no longer be protected.

The above rules apply only to international conflicts. However, the risk of attempts by each side to try to weaken the other by rendering its medical services inoperative is greatest in civil wars, or in mixed conflicts combining characteristics of both internal and international conflict, since the opposing forces are at such close quarters and their resources are often unequal. It is also in situations such as these, where clandestine activity tends to be the rule, that each side is likely to order its medical services to report all suspect wounds, in the hope of rooting out undercover fighters.

Only Article 3 is immediately applicable. It stipulates that: ‘The wounded and sick shall be collected and cared for’, and thus unquestionably forbids any attack on medical personnel. Conversely, it does not forbid other means of hindering the work of an adversary’s medical services in order to deprive enemy combatants of necessary medical care. The Nineteenth International Conference of the Red Cross, which met in New Delhi in October and November 1957, tried to fill this gap by adopting the following resolution:

The XIXth International Conference of the Red Cross, considering the efforts already made by the International Committee of the Red Cross to minimize the suffering caused by armed conflicts of all types, expresses the wish that a new provision be added to the existing Geneva Conventions of 1949, extending the provisions of Article 3 thereof so that:

a) the wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,

b) the inviolable principle of medical professional secrecy may be respected,

c) there may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes,

Furthermore, makes an urgent appeal to all Governments to repeal any measures which might be contrary to the present Resolution.5

The New Delhi Conference was unmistakably pointing the way for a future development of the law. It was therefore up to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law to incorporate these recommendations into positive law. It did so only to a very limited extent.
Medical activities are protected by Article 10, paragraph 1, of Protocol II, which reads:

Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

But the Diplomatic Conference paid mere lip service to the crucial matter of respect for medical confidentiality by adopting the following hypocritical provision:

Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded or sick who are, or who have been, under his care.6

Thus the law of the country only has to be amended to force doctors and other medical personnel to report their patients to the authorities. There really was no need to compose such sanctimonious phrases to grant the belligerents powers they had never denied themselves. The Diplomatic Conference lost no time in taking back with its left hand what it was pretending to hold out in its right.

Moreover, what a gulf there is between the general principle of inviolability of wounded and sick members of the armed forces, medical personnel and medical installations, and the way in which that principle has been embodied in positive law!

Such are the legal foundations on which the International Committee of the Red Cross has to base its work to protect both wounded and sick military personnel and medical personnel and installations in land warfare. It will be noticed that these provisions do not mention the ICRC. No wonder, for it is first and foremost the duty of military medical services and, in an auxiliary capacity, of the National Red Cross and Red Crescent Societies, to apply the fundamental principle underlying the entire law of Geneva that ‘wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for’, and those services and Societies are the first to benefit from the immunities laid down by the First Convention.

The ICRC could not, however, fail to be interested in the application of a principle that became positive law mainly through its own efforts. It has therefore based its efforts to protect wounded and sick in armed forces from the dangers of war on its right of humanitarian initiative.

* *

Now that the legal basis for the ICRC’s activities has been outlined, it remains to describe its practice.

In the first place, the Committee has taken every opportunity of emphasizing that the wounded and sick in armed forces are inviolable, and that this principle has mandatory force. It has made representations to this effect in practically every conflict since the 1864 Convention. Obviously they have
been most important in cases where the Geneva Conventions were not immediately applicable, as in the ICRC’s appeal of 12 March 1948 concerning Palestine and urging that:

Protection shall be given to the wounded and sick, and without distinction they shall be treated with humanity and shall be given the care which their condition requires. The vehicles for the transport of the wounded and sick, the mobile medical units and the fixed establishments of the medical service, the medical personnel as well as the medical equipment and stores, shall be respected and be accorded protection in all circumstances.7

This appeal was accepted by the Jewish Agency Executive on 4 April 1948, and by the Arab Higher Committee for Palestine on 5 April 1948.8 Similarly, in its appeal of 31 October 1956 concerning the events in Hungary, the ICRC insisted that: ‘The wounded and sick shall be collected and cared for without discrimination’.9 Two days later, in a message relating to the Suez conflict, the ICRC again insisted that: ‘The wounded and sick, whether members of the armed forces or civilians, friends or enemies, shall be collected and protected and shall receive without delay the treatment their condition demands’.10

In other cases the ICRC has cited the relevant provisions of the Conventions to stress the mandatory force of the principle that wounded and sick combatants are inviolable, as in its telegrams to all parties to the Korean conflict on 26 June 1950, which quoted Article 3 in full.11 Similarly, it has made innumerable calls for respect to be shown to the emblem of the red cross or red crescent, which is the visible sign of the protection due to the wounded and sick and to medical personnel and installations. Never in any war has the ICRC failed to remind all concerned of the vital importance of this emblem, underscoring the absolute need to prevent misuse of and forbid violations of it. The ICRC’s representations have been decisive: but for its untiring vigilance, the emblem would soon have been deprived of any protective value by its misuse, which in wartime spreads like the plague, and the countless violations which inevitably result. Its appeals and protests have been especially numerous in internal conflicts such as the blood baths in Lebanon and Chad some years ago, which are fought by a variety of militias and factions and the risk of misuse and violations of the emblem is thus particularly high.12 Furthermore, in spring 1948 the ICRC managed to obtain the assurance of the Arab authorities in Palestine and the Arab League that they would respect the emblem of the red shield of David (Magen David Adom), the distinctive sign used by the Israeli medical services, although it had no legal status.13

The ICRC has also intervened on countless occasions to counter accidental or deliberate disregard of the principle that wounded and sick combatants, and medical personnel and installations, are inviolable. In doing so, however, its main concern has been to restore the authority of the broken rule rather than to denounce violations after the event. The overwhelming majority of
such representations have been confidential, made with its customary discre-
tion, but in some cases it has gone public. During the Vietnam war, for
example, it publicized its representations to the responsible authorities con-
cerning the destruction by American and South Vietnamese armed forces of
National Liberation Front field infirmaries and stocks of medical supplies dis-
covered in the course of military operations.\textsuperscript{14} Similarly, in the Iran-Iraq
conflict the ICRC denounced as grave breaches by both parties the fact that
enemy wounded were abandoned on the battlefield.\textsuperscript{15}

The ICRC does not however confine itself to reminding belligerents, at the
start of hostilities or at the time of alleged violations, of the principle that
wounded and sick members of armed forces, as well as medical personnel
and installations, are inviolable. It may also be requested by a belligerent to
notify the latter’s adversaries of the names of the relief societies authorized to
assist the medical service of its armed forces. Such notification is all the more
important since under Article 26 of the First Convention the staff members
and volunteers of National Red Cross Societies and other voluntary aid soci-
eties duly recognized and authorized by their governments, who are exclu-
sively engaged in searching for and caring for the wounded and sick, are
placed on the same footing as medical personnel of the armed forces and
enjoy the immunities laid down by the Convention. However, before actually
using their services each belligerent must notify the other of the names of the
relief societies it has recognized and authorized.\textsuperscript{16}

The Convention does not specify through which channel this notification is
to be made. If no Protecting Power has been appointed, there is little doubt
that the ICRC will be the most appropriate channel.

Could a belligerent also request the ICRC to notify the adverse party of the
location of its hospitals and medical installations so that they will not be
attacked inadvertently? The 1949 Conference did not provide for this possi-
bility, for the obvious reason that in notifying the location of medical units
there was a risk of also revealing the tactical deployment of troops. However,
many armies now rely less on mobile medical units that follow combatant
troops than on fixed installations, many of them far from the front. So there
seems to be nothing against such notification being given, especially as Article
12, paragraph 3, of Protocol I provides for it. If there is no Protecting Power
the ICRC would certainly be the most appropriate means of conveying it.

Medical helicopters and planes are often the quickest and most efficient
means of collecting and evacuating the wounded. The Vietnam war and other
recent conflicts have amply demonstrated the potentialities of the new ‘flying
ambulances’, but also their vulnerability to interception and the inadequacy
of the treaty provisions applicable to them.\textsuperscript{17} Understandably, therefore,
those provisions were completely recast by the Diplomatic Conference on the
Reaffirmation and Development of International Humanitarian Law. The
new regulations on medical air transports largely incorporate the latest tech-
nical developments in distinctive signals and aircraft identification,\textsuperscript{18} but for
the greater safety of medical aircraft the party intending to use them can
notify the adverse party of their number, flight plan and means of identification.\textsuperscript{19} It is recognized that when flying over front-line areas ‘protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict’;\textsuperscript{20} and before flying over areas physically controlled by an adverse party that party’s agreement must be obtained.\textsuperscript{21}

The use of medical aircraft protected by the Geneva Conventions and Protocol I obviously requires the prior exchange of communications between belligerents, and presumably the ICRC will often be the most appropriate channel for these exchanges.

The fate of medical personnel who fall into enemy hands is also a matter of concern to the ICRC. In both world wars the ICRC repeatedly intervened on behalf of doctors, medical orderlies and nurses who had been taken prisoner, in particular those who were not required to look after prisoners of war of their own nationality. Its interventions were not always successful. However, it did manage to arrange for several thousand such medical personnel to be sent back to their own armed forces, thus enabling them to resume their work in aid of the wounded on the battlefield. Their repatriation took place either in operations for that specific purpose, or together with exchanges of seriously sick or seriously wounded prisoners of war. During visits to places of internment, ICRC delegates also checked on the living and working conditions of doctors and other medical personnel retained to look after prisoners of war of their own nationality.\textsuperscript{22}

Since the end of the Second World War medical personnel have seldom been taken prisoner in large numbers by the adverse party, but the ICRC has continued to keep a close watch on developments. For instance, after the conflict between India and Pakistan in December 1971 the ICRC approached the Indian government to ask that in accordance with Article 30 of the First Convention, any Pakistani doctors or orderlies who were not needed to look after their fellow-captives be released. The detaining power did not deem it possible to comply with the request, so they continued to languish in camps until the general repatriation of prisoners of war began in September 1973.\textsuperscript{23}

In other cases, however, medical personnel who were not needed to look after prisoners of war were set free either during hostilities or immediately after the end of active fighting, during operations to repatriate seriously sick and seriously wounded prisoners. Thus in the Grenada incident, 57 sick or wounded Cuban prisoners and ten Cuban medical personnel were repatriated by the ICRC on 2 November 1983, less than a week after the fighting ended.\textsuperscript{24}

The ICRC is also concerned with respect for the principle of neutrality of medical activities. Violations of this principle occurred in particular during the Second World War. Doctors and other medical personnel in occupied countries were executed for giving medical care to partisans or failing to denounce them to the authorities. When the hostilities ended others were
brought before courts and sentenced for having enrolled in the occupying power’s medical services or Red Cross Society, as to do so was regarded as an act of treason. The ICRC raised the issue at the Seventeenth International Conference of the Red Cross, held in Stockholm in August 1948, and submitted a report in which it stressed that the fact of giving care to wounded and sick should never be considered as an unlawful act or as equivalent to bearing arms against one’s own country. The Conference adopted a non-commital resolution referring the matter to the next Diplomatic Conference, which chose to evade the real difficulties. Article 18, paragraph 3, of the First Convention accordingly reads: ‘No one may ever be molested or convicted for having nursed the wounded or sick.’

The question of enrolment in the adverse party’s medical services or National Red Cross Society, and the crucial issue of respect for medical confidentiality in situations of armed conflict, were dodged.

The many conflicts since 1949 and most of all, perhaps, the Algerian war (1954–62) have been a constant reminder of these issues. In their attempt to crush the rebellion, the French authorities established a ‘medical blockade’. Their decree of 22 December 1956 prohibited the import into Algeria of medicines and other medical supplies, and the sale of numerous other articles was made subject to notification of the buyer’s name to the authorities. Several doctors and other medical staff who had treated insurgents were arrested and sentenced to long terms of imprisonment. Conversely, some French doctors, medical orderlies and nurses, were kidnapped or assassinated by the insurgents.

On the basis of Article 18, paragraph 3, of the First Convention and Resolution no. XVII of the New Delhi Conference, the ICRC repeatedly urged the French authorities to respect the fundamental principle of the neutrality of medical activities, and stressed that caring for the wounded should never be regarded as an offence. Although the French authorities would not budge from their position that the accused doctors and other medical personnel had not been prosecuted for giving medical care to insurgents, but on a charge of belonging to a criminal association, the ICRC’s interventions usually resulted in clemency or reduced sentences. In individual cases, therefore, solutions in accordance with the spirit of the New Delhi resolution were found. Nevertheless the essential ambiguity of Article 18, paragraph 3, was not overcome: it was not considered an offence to give medical care to insurgents, but enlistment in the other side’s medical services – to some extent a corollary of providing that care for insurgents – was punished. The ICRC also protested to the National Liberation Front against its murders of French military and civilian doctors and other medical personnel.

The Committee made similar representations on behalf of medical personnel captured in later conflicts, and met with the same difficulties.

Evidently, the ICRC has made great efforts to ensure respect for the principle of inviolability of wounded or sick military personnel and of medical personnel and installations. There are two specific applications of that principle,
however, which offer the ICRC the widest scope for action and therefore deserve special consideration:

- \textit{ratione loci}: hospital zones and localities, and
- \textit{ratione temporis}: truces and evacuations.

They are examined in the next two sections.

3. Hospital zones and localities

The proposal to establish hospital towns in which the wounded and sick in armies in the field could be given the medical attention required by their condition in perfect safety first came from Henry Dunant. He submitted it to the Empress Eugénie on 20 August 1870, when the armies of France and Prussia were engaged in hostilities in Alsace and Lorraine:

Would not Her Imperial Majesty be of the opinion that it would be a most useful step to propose to Prussia that a number of towns, to which the wounded would be sent, be declared neutral? This would shelter the wounded from the dangers of war, and members of the public who look after them would be protected by the safeguards granted in such circumstances by the Diplomatic Convention.\textsuperscript{29}

His proposal of course came to nothing in the upheaval that followed the collapse of the French Second Empire.

The question of hospital zones and localities was not examined again before the First World War. It was believed that the Geneva Convention, revised in 1906, would ensure that wounded military personnel received the necessary medical treatment.

The development of military technology throughout the First World War and during the inter-war period, however, led to renewed interest in safety zones where the wounded and sick could be sheltered from the fighting and given appropriate care.

The earliest plans for neutral hospital localities came from French army doctor General Georges Saint-Paul and the associations of military doctors and pharmacists.\textsuperscript{30} The matter was then referred to the Sixteenth International Red Cross Conference, which instructed the ICRC to consult experts and draft a Convention on the subject, while declaring that ‘the creation of hospital towns and hospital areas could not in any way weaken the protection resulting from the rules of International Law as a whole’.\textsuperscript{31} The ICRC had held a previous conference of experts in October 1936, and convened a second in October 1938. They prepared a ‘Draft Convention for the creation of hospital localities and zones’, which the Swiss Federal Council sent to the governments invited to take part in the Diplomatic Conference scheduled for spring 1940. But war broke out in 1939, and the conference could not take place.\textsuperscript{32}
During the Second World War the ICRC appealed to the belligerents on three occasions to set up hospital and safety zones and localities where the following might find refuge:

- wounded and sick members of the armed forces;
- civilian wounded and sick;
- certain categories of civilians who take no part, not even indirectly, in the fighting, and make not the least contribution to the war potential of the state (children, old people, pregnant women, and women with young children).

These proposals came to nothing.33

However, the terrifying increase in the scale and violence of air warfare seriously undermined the fundamental principle that non-combatants are immune from attack. The need for hospital and safety zones and localities was so imperative that when the humanitarian conventions were revised, it had to be taken into account. Moreover, neutralized zones had already been set up and respected in Madrid (1936–7), Shanghai (1937) and Jerusalem (1948), and their success gave the lie to the scepticism of all too many experts.34 Understandably, therefore, the Seventeenth International Conference of the Red Cross and the 1949 Diplomatic Conference largely followed the ICRC’s proposals. Thus Article 23 of the First Convention came into being:

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties to the conflict, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.35

This article is supplemented by Annex I to the First Convention, a ‘Draft agreement relating to hospital zones and localities’, which amplifies Article 23 by taking over key provisions of the 1938 draft.36 Legally, the draft agreement is no more than a model for use by the belligerent parties if they so wish, but it is nevertheless a valuable example because it was adopted by the Diplomatic Conference.37

International conventions are meant to confer rights and obligations on the states which are party to them. At first sight Article 23 and the relevant Annex do not do this; they merely confirm powers that the belligerents have
anyway. Nevertheless they do have a precise legal significance, for although hospital zones and localities are not protected by the Convention until they are recognized by the adverse party, the fact that they are based on treaty provisions at once gives rise to a presumption of their legality. Therefore, a belligerent could not refuse to recognize the adverse party’s hospital zones and localities without showing good reason for its refusal, and any belligerent opposing the institution of hospital zones and localities would be responsible for the consequences.

In practice, the institution and recognition of hospital zones and localities requires the services of a neutral intermediary. In accordance with the general tenor of the Geneva Conventions, this task has naturally been assigned to the Protecting Powers or the ICRC. It entails much more than the merely administrative function of forwarding communications between the belligerents, for the ICRC and Protecting Powers are ‘invited’ by the Convention itself ‘to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities’. They are therefore certainly entitled to make proposals to that effect; furthermore, in international law the very notion of ‘good offices’ includes the power to take the initiative.

Lastly, recognition of hospital zones and localities necessarily presupposes some form of supervision. No belligerent would agree to respect the neutrality of hospital zones and localities proposed by its adversary unless it could be reasonably sure that their misuse by the enemy to gain a military advantage was impossible. The experts meeting in 1938 advocated that such supervision should be carried out by neutral commissions appointed by the ICRC. In the drafts submitted to the 1948 Stockholm Conference the ICRC itself proposed entrusting this task to the Protecting Powers. The latter proposal is fully consonant with the responsibilities of the Protecting Powers as set out in common Article 8/8/8/9 and indicated by the general tenor of the Conventions, and was accepted without discussion by the Stockholm Conference and thereafter by Committee I of the 1949 Diplomatic Conference. However, during the draft’s final reading in plenary, the Swiss delegation objected that ‘such control’ went far beyond the functions of a Protecting Power and was incompatible with the relations that the diplomatic mission of a neutral state was bound to maintain with the authorities of the state to which it was accredited. The Swiss delegation accordingly proposed that all references to the Protecting Powers should be deleted from the provisions for the supervision of hospital zones and localities. The proposal was adopted by twelve votes to eleven with fourteen abstentions. The result was Article 8 of Annex I:

Any Power having recognized one or several hospital zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions, for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose the members of the Special Commission shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.
The Convention itself does not specify who is to nominate the Special Commissions; obviously, the decisive factor will be the agreement of the warring parties. Under Article 10 of Annex I, the belligerents may by mutual agreement choose the members of the Special Commissions, or may have them nominated by neutral powers; and the belligerents can, if they so agree, always ask the ICRC to nominate those members.

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However, the application *ratione loci* of the principle that the wounded and sick in armed forces are inviolable is not entirely covered by the provisions examined above. The idea throughout the deliberations on hospital zones and localities had indeed invariably been to set up relatively permanent zones far from the firing line, but the Spanish Civil War, the Sino-Japanese conflict and in particular the Palestine conflict pointed in an altogether different direction, that of temporary safety zones in the immediate vicinity of the front.

It would have been irresponsible to ignore the lessons of experience. The ICRC therefore proposed that provisions on neutralized zones be included in the draft Conventions submitted to the Stockholm Conference. After a few stylistic alterations the draft was endorsed by the Seventeenth International Conference of the Red Cross and then by the 1949 Diplomatic Conference. The result was Article 15 of the Fourth Convention:

Any Party to the conflict may, either direct or through a neutral state or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

a) wounded and sick combatants or non-combatants;

b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.44

Although the Fourth Convention relates to the protection of civilian persons in time of war, this article also applies to wounded and sick military personnel; the terms used leave no room for doubt on this point.45 Besides, nothing would be farther from the spirit of the Geneva Conventions than to exclude wounded and sick members of armed forces from these zones.46

The belligerents may request the ICRC to pass on communications concerning the institution of neutralized zones. Moreover, the right of humanitarian initiative confirmed by common Article 9/9/9/10 of the Geneva Conventions fully entitles the ICRC to offer its services to establish neutralized zones. Indeed, this is what has always happened in the past.
The ICRC has made full use of its possibilities under Article 23 of the First Convention and Article 15 of the Fourth Convention. In particular, it established the following safety zones:

- at Dacca (Dhaka) in December 1971;
- at Nicosia in August 1974;
- at Phnom Penh in April 1975;
- at Managua and other towns in Nicaragua in July 1979;
- at N'Djamena in March 1980;
- at Port Stanley in June 1982;
- at Tripoli (Lebanon) in November 1983.

The dividing line between the hospital zones and localities mentioned in Article 23 of the First Convention and the neutralized zones mentioned in Article 15 of the Fourth Convention is clearer in theory than in practice; but in each of the above cases it does seem that the safety zones were of relatively brief duration and intended to shelter non-combatants from temporary danger. In other words, they were primarily neutralized zones of the type mentioned in Article 15 of the Fourth Convention. Moreover, they gave shelter to civilians as well as to wounded and sick military personnel. Lastly, the provisions of the Fourth Convention concerning safety zones are of wider scope than those in the First Convention, for wounded and sick military personnel and civilians can both take refuge there. To avoid repetition, ICRC practice will be examined in the chapter relating to the protection of civilians against the dangers of war.47

4. Truces and evacuations

Whereas a safety zone calls for a suspension of hostilities in a limited area, a truce is an interruption of hostilities for a limited time. It may cover the whole theatre of war or only a single sector. Its aims are always limited, for example to permit a search for the wounded and the dead, a meeting for negotiations, an exchange of prisoners or the evacuation of a besieged locality.

Truces are an institution as old as war itself. They were well known in Greek antiquity,48 and in medieval Europe the Church was foremost in arranging suspensions of hostilities.49 To call a truce is a universal practice of which there are well-documented examples in all civilizations.

Moreover, until the end of the nineteenth century battles never continued after sunset. A war could last a hundred years, but no battle lasted more than a day. Even without any agreement between the opposing sides, sunset imposed a moratorium which was used to collect the wounded and bury the dead. ‘Night has power over gods and men’, sang Homer.50 That the
wounded were left to die on the battlefield of Solferino was entirely due to the negligence of the military supply services and not because the fighting went on. The battle was over long before nightfall.51

Battle by artificial light is one of the infamous innovations of this century. In the First World War whole armies fought, as they have done ever since, day and night under a hail of fire for weeks or months on end for a hill, a thicket, a sunken road or a few shattered fire-blackened walls. Fort de Vaux and Douaumont will forever symbolize those endless sacrifices.

How then is it possible to bring aid to the wounded in no man’s land, or to collect or even identify the dead before they sink beneath the mud of shell holes?

On 16 October 1915 the ICRC, alarmed by the swelling numbers of missing soldiers, sent an open letter to all belligerent states calling upon them to observe, whenever the fighting permitted, ‘a few hours’ suspension of hostilities … to enable orderlies on both sides to collect the wounded, identify the day’s casualties and bury the dead.’ On this matter at least, the warring governments saw eye to eye; they all refused.52

The 1929 Diplomatic Conference took a first timid step towards settling this matter; Article 3 of the Geneva Convention of 27 July 1929 on the wounded and sick stated:

After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment.

Whenever circumstances permit, a local armistice or a suspension of fire shall be arranged to permit the removal of the wounded remaining between the lines.

These provisions were amplified in the proposals submitted to the 1949 Conference. The result was Article 15 of the First Convention:

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.53

These provisions are intended primarily for the parties to conflict, but paragraphs 2 and 3 of Article 15 also concern the ICRC, for the conclusion of a truce and supervision of the search for wounded and sick combatants usually require the good offices of a neutral intermediary. The ICRC is often the intermediary best placed to supervise short truces concluded for purely humanitarian purposes.
There is little doubt that the ICRC can intervene when requested to do so by either party, and is also entitled, as part of its right to take humanitarian initiatives, to make an unsolicited offer of its services in order to arrange a truce and the evacuation of wounded, sick and dead combatants.

These conclusions are confirmed by the ICRC's practice, which will now be considered. It is not possible, however, to make an exhaustive inventory of ICRC interventions of this kind, for many of them have led only to short cease-fires of purely local interest, and not all of them have been recorded. A few particularly significant cases may nevertheless be mentioned.

In the first few months of the Palestine conflict (1948), ICRC delegates were requested almost daily to bring in casualties – dead or wounded combatants, or civilians caught in the crossfire – from the front line and more often than not from no man's land. It was necessary to get the agreement of all the parties to a cease-fire before venturing between the lines, and possibly into minefields, without any protection other than the belligerents' assurances and the emblem of the red cross. The ICRC delegates were oblivious to all but their duty, and displayed exceptional courage and self-sacrifice, bringing in hundreds, perhaps thousands, of wounded in extremely difficult conditions. Missions of this kind far exceeded the duties of the ICRC. They exposed ICRC delegates to disproportionate risks, for although the belligerents had agreed to a cease-fire they were all the less reluctant to break it when the lives of their own men were not at stake. After several serious accidents in which ICRC delegates and the people they were trying to help were killed or wounded, the ICRC was forced to recognize that, where the parties to the conflict did not feel that they should endanger their own medical personnel, it had little choice but to adopt the same attitude. It decided instead to resume a practice more in line with its traditional role; it instructed its delegates to help to arrange truces and supervise their due observance, leaving the belligerents' medical services to collect the wounded and dead from between the lines.

On 4 November 1956, at the height of the fighting in Budapest and in response to an urgent request from the Hungarian Red Cross, the ICRC appealed to the commanders and combatants to conclude a truce to allow the collection and care of the wounded in accordance with Article 15 of the First Convention. Its appeal was communicated to the Hungarian and Soviet authorities and broadcast on several wavelengths. Meanwhile the ICRC delegates in Budapest made repeated attempts to bring about a cease-fire so that the many wounded lying in the streets could be collected. All the ICRC's efforts were in vain.

Bitter fighting erupted in Bizerta from 19 to 22 July 1961 between French and Tunisian forces. At the request of the Tunisian Red Crescent the ICRC sent a delegation to Bizerta on 22 July 1961. That night fighting was ended by a cease-fire. In the early hours of the next morning the ICRC delegate crossed the lines and negotiated an agreement to allow the Tunisian Red Crescent to evacuate casualties who could not be given appropriate care on
the spot. Five convoys conveyed a total of 266 military and civilian wounded to hospitals in Tunis, and on the same day Red Crescent teams buried more than 800 dead bodies to avert the outbreak of widespread epidemics.57

The coup of 25 April 1965 in the Dominican Republic plunged the country into civil war and was soon followed by an American landing. Fighting was interrupted on 30 April but broke out again on 13 May, so violently that it was practically impossible to retrieve the dead and wounded. When the ICRC delegate arrived in Santo Domingo on 16 May he at once set about negotiating a truce for the Dominican Red Cross to collect the casualties. After repeatedly travelling back and forth to consult the leaders of the two contending juntas, the ICRC delegate managed, with valuable support by the President of the Dominican Red Cross, to persuade both parties to agree to a 24-hour cease-fire, beginning on 21 May 1965 at noon. This was scrupulously observed, and nearly 5000 wounded were collected and cared for by Dominican Red Cross teams, who also managed to collect the dead and supply the Santo Domingo hospitals with food and medicines. The belligerents failed to reach an agreement to extend the truce, but neither side resumed hostilities, so that in effect the cease-fire negotiated by the ICRC delegate and the President of the Dominican Red Cross brought hostilities to an end.58

During the events in Kisangani in July 1967, a special ICRC mission evacuated more than 600 people held by European mercenaries who had mutinied against the Congolese government. The captives were badly wounded soldiers of the Congolese National Army who could not be properly cared for on the spot. They and their families were flown out to Kinshasa.59

The hijacking of three airliners to an improvised landing strip near Zarqa led to violent clashes which on 17 September became a full-scale civil war between regular Jordanian armed forces and Palestinian movements. Fierce fighting in the Jordanian capital, Amman, made it impossible to collect the dead and wounded. Severe casualties died for lack of care, and others, left to fend for themselves, fell victim to gangrene and infection. Alarmed by this situation, on 23 September the ICRC appealed to all the warring parties to conclude a 24-hour truce throughout Amman and in a radius of 20 kilometres around it, so that the wounded could be evacuated and cared for. Its appeal went unheard. Not until 27 September was a cease-fire agreed in Cairo under the auspices of President Nasser, and fighting ceased two days later. In spite of the particularly difficult circumstances the delegates managed to evacuate more than 150 seriously wounded combatants or civilians to Beirut on a plane chartered by the ICRC.60

The situation in the 300-bed hospital in Suez at the end of the Arab-Israeli war of October 1973 was desperate: there were more than 1300 patients, most of them military casualties requiring urgent and extensive treatment. The city was completely encircled by Israeli forces, essential supplies were lacking, and the main building of the hospital had been partly destroyed. The
wounded in the field hospitals of the Egyptian Third Army in the Sinai were no better off, for the Third Army itself was surrounded, cut off from all its supply sources and had practically no medical supplies left. Alerted to this critical situation, the ICRC immediately contacted the Egyptian and Israeli authorities with a view to evacuating all patients, military and civilian, to hospitals in the Nile Valley. The negotiations were almost complete and the operation was due to begin on 28 October, when the Israeli authorities announced that they would oppose any evacuation of Egyptian wounded because Egypt had failed to comply with the Third Geneva Convention. In the end the matter was settled by two bilateral agreements concluded under United Nations auspices at the Kilometre 101 checkpoint on 11 and 14 November 1973. The 1300 patients were evacuated from the Suez hospital in three operations between 15 and 18 November 1973. These were coordinated with the operations for the repatriation of prisoners of war between Egypt and Israel and were carried out under ICRC auspices, using Egyptian Red Crescent ambulances driven by the United Nations Emergency Force. The remaining wounded members of the Egyptian Third Army were evacuated to Cairo in ambulances driven by United Nations personnel.

About 300 civilian and military wounded and sick were evacuated in subsequent operations in January 1974. In all, 1636 wounded and sick were evacuated by 23 January 1974 under the auspices of the ICRC.61

The conflict in which ICRC delegates were most often asked to arrange truces to collect and evacuate the wounded is surely the civil war that raged in Lebanon from 1975 to 1990. It is also the conflict in which their attempts met with the greatest difficulties, because of the break-up of the Lebanese state into a host of rival factions, the innumerable ill-disciplined militias, and the countless snipers operating with impunity in the prevailing anarchy.

Nevertheless the ICRC delegates carried out several extremely delicate operations at great personal risk. The most important of these, and probably the one that most clearly shows the obstacles they had to overcome, is the evacuation of the wounded from Tall-al-Zaatar, a Palestinian camp in the suburbs of Beirut besieged by the Christian militias since June 1976. After several attempts which failed because cease-fire arrangements were never respected, three ICRC delegates managed to get through to the camp on 23 July. They found about a thousand casualties there in dire straits: the doctors were short of medicines, gangrene and tetanus had appeared, and there was a danger of epidemics due to the shortage of water. It was urgently necessary to evacuate the wounded, but particularly difficult since the camp was completely surrounded and the roads leading to the camp had first to be cleared.

The ICRC repeatedly urged all parties to agree to a truce so that an evacuation could take place. At last, on 3 August, the minimum safety conditions indispensable for the protection of the victims and their rescuers were secured and ninety-one wounded were evacuated that same day in ICRC lorries and ambulances waiting outside the camp. Another 243 wounded were brought out the next day. The third operation, on 6 August, had to be suspended when a
wave of panic spread through the civilian population and renewed fighting broke out; only seventy-four people were evacuated.

In view of these serious incidents the ICRC decided that the only really humanitarian solution for the plight of the besieged camp dwellers was to evacuate the wounded and the camp’s entire civilian population. Negotiations were under way when the fall of Tall-al-Zaatar was announced on 12 August.

In carrying out the operations of 3, 4 and 6 August the ICRC delegates were assisted by Lebanese Red Cross volunteers and by stretcher-bearers from the ‘Palestinian Red Crescent’. 62

The ICRC delegates in Lebanon also carried out several other such operations, including that of spring 1981 when they evacuated wounded and sick from the town of Zahle which was besieged by ‘Arab Deterrent Force’ contingents. 63

The taking of hostages at the Presidential Palace in Managua on 22 August 1978 was the signal for an insurrection in which Sandinista National Liberation Front (FSLN) rebels seized several Nicaraguan towns. These were reconquered by the National Guard a few weeks later in fighting so fierce that it was often impossible to retrieve the wounded and dead. The ICRC delegate repeatedly approached President Somoza to obtain safe conducts allowing Nicaraguan Red Cross volunteers to enter the combat areas and collect the wounded and dead there, replenish hospital stocks and distribute relief supplies to the civilian population. After a number of unsuccessful attempts in which two volunteers from the National Red Cross Society were killed, several operations were carried out under ICRC auspices, for example in León on 16 September and at Esteli on 18 and 21 September. Short truces enabled Nicaraguan Red Cross teams to collect the wounded, bury the dead and distribute large quantities of relief supplies. The most serious casualties were evacuated to hospitals in the capital, Managua.

Similar operations took place in the spring of 1979, in the fighting that led to the overthrow of the Somoza regime. 64

The civil war in Chad had for years spared the capital, N’Djamena. Hostilities were concentrated around the oases in the north of the country until the spring of 1979, when the situation abruptly changed. From 12 February onwards heavy fighting caused many casualties in N’Djamena, where a veritable front line split the city into two opposing sectors. The ICRC promptly made a broadcast appeal on 13 February to all parties to respect fundamental humanitarian principles in their treatment of the wounded and of prisoners and non-combatants. At the same time the delegates on the spot made every effort to negotiate a suspension of hostilities. Their efforts and those of other intermediaries led to a truce – the first – that enabled the ICRC delegates and local rescue workers to collect the wounded and take in supplies to the hospitals. Both warring parties asked the delegates to supervise the collection and burial of the many dead lying in the
streets. Heavy fighting was also reported from Abéché in the east of the country, and the delegation did its utmost to bring aid to the wounded and evacuate the most seriously wounded, who were flown out on aircraft chartered by the ICRC to hospitals in the capital on 14 and 19 February 1979. The cease-fire agreement of 19 February acknowledged the role of the ICRC by allowing for its vehicles to travel freely wherever they were needed.

Yet a cease-fire is not peace, and the build-up of tension sparked many incidents. On 21 March 1980 fighting again flared in the capital, and since both sides used mortars and artillery, the destruction and casualties were much greater than in the previous year. Alarmed by the appalling number of civilian victims, on 27 March the ICRC delegation informed both sides that a neutralized zone had been established under ICRC responsibility around the central hospital in N'Djamena, and asked for a 48-hour truce so that the wounded could be collected and the civilian population evacuated from the combat zone. Whereas the neutralized zone was fairly well respected, the truce was not observed despite the assurances given by both sides. The ICRC medical teams did their best to give first aid to the wounded at collection points, then took advantage of lulls in the fighting to take severe casualties to a field hospital set up by the French government on the western bank of the Chari, as the hospitals in the capital were too badly damaged to provide anything but basic emergency care. More than 900 seriously wounded were thus evacuated in dugout canoes or by other makeshift means to Kousseri in Cameroon.

The ICRC carried out similar operations in the following months.65

The Israeli offensive of 6 June 1982 in Lebanon culminated in the siege of the western quarters of Beirut, where the Palestinian forces and some of the Syrian troops from the ‘Arab Deterrent Force’ were entrenched. It soon became clear that the only way of saving West Beirut from being taken by storm and avoiding street fighting that would result in carnage among the civilian population would be to evacuate all the Palestinian fighters. After prolonged negotiations the American emissary Philip Habib managed to lay the foundations of an agreement in principle to that effect. The ICRC was then requested to organize the evacuation. As this amounted to withdrawing able-bodied fighters from a besieged position, the proposal gave rise to serious ethical and legal objections, as well as security problems with which the ICRC is totally unfitted to cope. Nevertheless, in view of the immense dangers threatening the Beirut population and by virtue of Resolution X of the Twentieth International Conference of the Red Cross,66 the ICRC agreed to undertake this assignment, on condition that all the parties concerned formally requested it to do so and that it would be enabled to exercise real control over the operation. The Palestinian combatants, however, insisted on taking their personal weapons with them and refused to be evacuated under the red cross emblem, which they felt would have been perceived as proof of their defeat. So some other solution had to be found.

The able-bodied Palestinian combatants were ultimately evacuated under the auspices and protection of the French, American and Italian contingents
of the Multinational Peacekeeping Force. The ICRC took charge of the 238 wounded, evacuating them in two operations on 26 August and 6 September 1982 on board the hospital ship Flora, chartered and placed at its disposal by the German Red Cross.67

These few examples – especially the last – clearly show the limits within which it is possible for the ICRC to operate. These it has always kept well in mind:

- The evacuation of wounded and sick combatants and of non-combatant civilians is a humanitarian action given legal sanction by the Geneva Conventions. The ICRC has appropriate means at its disposal to carry it out, namely its status as a neutral intermediary, its right of humanitarian initiative, and the protective emblem which Article 44, paragraph 3, of the First Geneva Convention expressly entitles it to use.

- On the other hand, the evacuation of able-bodied combatants is a political and military operation requiring political and military means, if only to ensure the safety of the evacuees from the time they leave their defensive positions until they reach the safety zone prescribed in the evacuation plan. The ICRC has no such means.

Save in very exceptional circumstances – and such, no doubt, was the crisis in the summer of 1982 – the ICRC should not allow itself to be drawn into operations for which it was never intended and whose strategic implications are out of all proportion to the means of action at its disposal.

These examples also serve to show the limits of the ICRC’s duties as regards truces and evacuations. Those duties are evidently part of its role as a neutral intermediary.

The first of them is to negotiate between the opposing parties. A humanitarian institution such as the ICRC is particularly well qualified to do so, because it can contact all groups exercising de facto authority over the victims of the conflict, whatever the status of such groups in international or domestic law and without affecting that status. The ICRC’s duty is, then, essentially that of offering its services to facilitate an agreement between the parties as to the principle and terms of a truce. However, they are not required to conclude a bilateral agreement; it is enough if each party enters into a separate undertaking with the ICRC, provided the undertakings tally.68 A truce, or a suspension of hostilities, is of course a temporary arrangement of limited duration and territorial extent. It does not affect the parties’ legal or political position.69 Legal opinion is unanimous on this point.

ICRC delegates may be asked to monitor the extent to which undertakings are being honoured. Experience shows that each party to conflict will be reluctant to order a cease-fire unless it is sure the other side is doing likewise. The presence of delegates of the ICRC, or of any other body enjoying the confidence of both sides, will usually be regarded by the belligerents as an adequate guarantee that promises made will be kept.
ICRC delegates may also be called upon to mark out the area to which the truce applies. When wounded combatants and civilians are to be evacuated, the use of the red cross emblem is authorized and fully compatible with Article 44, paragraph 3, of the First Convention.

Lastly, ICRC delegates may be called upon to supervise the agreed operations, for instance to certify that stretcher-bearers going to collect wounded between the lines are not bearing offensive weapons, or that vehicles used for evacuation are not carrying military equipment. Experience shows that supervision of this kind may well be needed to give that essential degree of trust without which parties to a conflict will simply not agree to a truce.

It is, however, certainly not the duty of ICRC delegates to collect the wounded in no man’s land. That is the duty of the army medical corps, and to a lesser extent of the first-aid workers of National Red Cross or Red Crescent Societies. It is their job and it is they who are protected by the immunities prescribed for this purpose. As the Palestine conflict showed, ICRC delegates should not consent to run risks to which the belligerents themselves refuse to expose their armed forces’ medical services.

Nevertheless, although it is perfectly clear where their responsibilities begin and end, ICRC delegates can certainly not be blamed for having all too often done much more than their duty to come to the aid of wounded combatants left untended on the battlefield.

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Although Articles 15 and 23 of the First Convention apply ipso jure only to international armed conflicts as described in Article 2 common to all four Conventions, they may very well be taken as a guide in non-international armed conflicts. The provisions relating to hospital zones and localities, and to truces and evacuations, merely specify certain ways of applying the rule that ‘the wounded and sick shall be collected and cared for’. That rule applies to internal as well as international conflicts, for it is explicitly stated in Article 3 of the Geneva Conventions. Besides, paragraphs 2 and 3 of Article 15, and Article 23, are essentially exhortations. They do not impose on the parties to conflict any obligation not implicitly contained in the aforesaid general rule.

Similarly, Article 8 of Protocol II is essentially a restatement of the law in force, setting out an obligation already contained in Article 3 of the 1949 Conventions. It reads:

Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

These interpretations are confirmed by ICRC practice – the ICRC has unhesitatingly invoked Articles 15 and 23 of the First Convention in internal as
well as international conflicts – and by the practice of the belligerents, for more often than not it is in non-international armed conflicts that these provisions have been effectively applied.

Notes


3 This provision, although primarily intended for civilians lending assistance to the wounded or sick on the battlefield, applies a fortiori to members of the military medical services. This is confirmed by the Commentary, vol. I, pp. 192–3.

4 Examination of the preparatory work leads, however, to the conclusion that Convention I does not protect medical confidentiality. Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, 4 volumes (hereinafter Final Record 1949), vol. II-A, p. 192.

5 Resolution XVII, XIXth International Conference of the Red Cross, New Delhi, October-November 1957, Proceedings, pp. 103–4 and 154–5.

6 Article 10, paragraph 4, of Protocol II.

7 RICR, English supplement, no. 5, May 1948, p. 86.

8 Ibid., p. 87.


13 RICR, English supplement, no. 6, June 1948, pp. 104–5.

14 ICRC Archives, file 202 (69) – Ila; IRRC, no. 65, August 1966, p. 410.


16 Article 26, paragraph 2.

17 The use of medical aircraft is regulated by Article 36 of Convention I, Article 39 of Convention II, and Article 22 of Convention IV.

18 See Articles 9 and 24–31 of Protocol I.

19 Article 25 of Protocol I.

20 Article 26 of Protocol I.

21 Article 27 of Protocol I.


23 ICRC Archives, file 211 (66); Annual Report 1972, p. 51.


28 ICRC Archives, file 202 (12) and 225 (12); Annual Report 1958, p. 9.


31 Resolution no. XI of the Sixteenth Conference. The following should also be consulted: Quinzième Conférence internationale de la Croix-Rouge tenue à Tokyo du 20 au 29 octobre 1934, Compte rendu, pp. 201–2 and 261; RICR no. 236, August 1938, pp. 681–717; Sixteenth International Conference of the Red Cross, London, June 1938, Report, pp. 80–2 and 104.


34 For information on the neutralized zones in Madrid, Shanghai and Jerusalem, see Hospital Localities and Safety Zones, pp. 13–16 and 23–36.


36 For the legislative history of Annex I see footnote 35 above.

37 As the Commentary, vol. I, p. 215, also observes.

38 See ibid., pp. 215–16.
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39 Ibid.
40 Convention for the Pacific Settlement of International Disputes, signed at The Hague, 18 October 1907, Articles 3 and 6.
41 Article 9 of the 1938 draft, RICR, no. 243, March 1939, pp. 191–2.
42 XVIIth International Conference of the Red Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims, pp. 216–17.
45 As the Commentary, vol. IV, p. 131, also shows.
46 It is not uncommon for the provisions of two of the Conventions to overlap. For example, civilian wounded and sick in military hospitals enjoy ipso facto the protection given to such hospitals by the First Convention (see Article 22, subparagraph 5, of the First Convention).
47 See Part IV, Chapter I-B, Section 5 below, pp. 748–62.
48 After fierce fighting the Achaians and Trojans concluded a one-day truce to collect the dead and render the honours due to them (Homer, Iliad, Book VIII). Similarly Achilles, having slain Hector in single combat, gave back the body to old King Priam and promised a truce so that the Trojans might worthily mourn their champion (Iliad, Book XXIV).
52 Bulletin international des Sociétés de la Croix-Rouge, no. 185, January 1916, pp. 16–18; no. 186, April 1916, pp. 159–62.
54 See, for example, de Reynier’s report on the evacuation of forty-nine wounded at Nabi Danyal, 31 March 1948, ICRC Archives, file G.59/I/IC, file IV, Mission by M. de Reynier (Box 830), and the report of Dr Lehner and Dr Fasel on the evacuation of wounded, non-combatants and prisoners from Kfar Etzion, 15 May 1948, ICRC Archives, file G.59/I/IC, file X, Mission by Dr Lehner and Mlle Thorin (Box 836).
55 RICR, English supplement, no. 6, June 1948, pp. 102–7; no. 8, August 1948, pp. 128–9; no. 9, September 1948, pp. 147–9; ICRC Archives, file G.59/I/IC, Civil War in Palestine, Mission by Mr de Reynier, January 1948–July 1949.
56 RICR, English supplement, vol. IX, no. 12, December 1956, p. 211; ICRC Archives, file 200 (65).
The ICRC and the Protection of War Victims


66 The Red Cross, factor of peace in the world’, XXth International Conference of the Red Cross, Vienna, October 2–9, 1965, Report, pp. 100–1; Handbook of the International Red Cross and Red Crescent Movement, pp. 640–1.

67 IRRC, no. 230, September–October 1982, pp. 295–6; Annual Report 1982, pp. 56–9; Keesing’s Contemporary Archives, 1983, pp. 31914–20; Minutes of the Executive Board, 1 July 1982, 11 and 12 August 1982, 19 August 1982, 26 August 1982; Minutes of the Assembly, 19 August 1982 and 1 September 1982. This, being a seaborne operation, was not based on Article 15, paragraph 3, of Convention I, but on Article 18, paragraph 2, of Convention II: ‘Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.’

68 The Santo Domingo truce of 21 May 1965 was brought about by the signature of two separate documents. See IRRC, no. 52, July 1965, pp. 362–4.


References


There is, so far as I know, no literature on the subject of truces and evacuations.
CHAPTER II

TRACING WOUNDED, SICK AND MISSING MILITARY PERSONNEL IN WAR ON LAND

When sorrows come, they come not single spies,
But in battalions.
William Shakespeare
*Hamlet*, Act IV, sc. 2, l. 78

For centuries soldiers killed in battle were left where they lay or thrown into mass graves. Nobody bothered to identify the corpses: ‘At that time armies had little concern for their fighting men and even less for those of their adversaries. After an important battle, the dead were thrown into a common grave and the number of unidentified bodies often outnumbered the identifiable ones’, as Gradimir Djurovic rightly observes.¹

It is easy to imagine the anguish of their families, who were tortured by hope daily renewed and daily disappointed. Only after many months and the inglorious return of the invalids and prisoners did the bereaved families accept the harsh reality that their beloved son or husband would never come home. There was not even the meagre consolation of knowing for certain that he was dead.

This state of affairs was as intolerable as the total neglect of the wounded recorded by Dunant after the battle of Solferino. Indeed, one was the logical result of the other.

Dunant had seen all this at Castiglione. He had seen the dead – and probably some of the wounded – hastily buried without any serious attempt to identify them. He did not see the grief of the families they had left behind in France or Piedmont or Austria. But he did witness time and again the anguish of wounded men as an anonymous death drew near, and their longing to send a last farewell to their loved ones, to whom it would at least bring the comfort of knowing for sure what had happened to them. ‘Oh, Sir, if only you could write to my father to comfort my mother’, said young Corporal Mazuet of Lyon, their only son, as he lay dying.²

Obviously, the Red Cross could not set out to bring aid to the wounded without regard for the way the dead were laid to rest and the suffering of their families. It therefore raised these questions at the first International Conferences, held in Paris in 1867 and in Berlin in 1869.

The first thing to be done was to reduce the number of missing persons and therefore to find a way of identifying the dead.
Several armies issued soldiers with a paybook that was also a valid identity document, but they carried it in their packs, which they shed before going into battle. It was therefore useless in identifying the dead.

In the French army all equipment was stamped with a personal number whose holder could in theory be identified from the quartermaster’s records. But the morning after a big battle many of the dead on the battlefield were left naked, having been stripped by looters during the night. In nineteenth-century Europe even a jacket torn by shot was too precious to be left on a corpse that would soon be thrown into a mass grave.

What was needed was some form of identification that every soldier would always carry on his person, weatherproof evidence that would outlive all the hazards of service in the field, so that whatever happened it would identify the wearer. The First International Red Cross Conference, meeting in Paris in 1867, adopted a resolution to that effect. Hence the identity disc that all soldiers in the world should wear suspended on a chain round their necks.

There also had to be an obligation for the victorious army to make known the names of the wounded men brought in by its medical services, and the identity of the dead collected on the battlefield. The Paris Conference adopted a resolution to that effect, but only when the Geneva Convention was revised in 1906 did this obligation become part of positive law. Thus Article 4 of the Convention of 6 July 1906 states:

As soon as possible each belligerent shall forward to the authorities of their country or army the military identification marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Lastly, a channel had to be arranged for the exchange of these communications. The Red Cross did so in Resolution IV/3 adopted by the Second International Conference, meeting in Berlin in 1869:

In time of war, the International Committee shall ensure that a liaison and information office is set up in a suitably chosen location, which shall facilitate, in every possible way, the exchange of communications between committees and the sending of relief supplies.

The Red Cross clearly lost no time in establishing a system to elucidate the fate and whereabouts of missing servicemen and to inform their families. Its value was demonstrated in two world wars and many other conflicts, and the 1949 Diplomatic Conference retained it without significant alteration. These subjects are regulated by Articles 16 and 17 of the First Geneva Convention. Article 16:

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

a) designation of the Power on which he depends;
As soon as possible the above mentioned information shall be forwarded to the
Information Bureau described in Article 122 of the Geneva Convention relative to
the Treatment of Prisoners of War of August 12, 1949, which shall transmit this
information to the Power on which these persons depend through the
intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same
bureau, certificates of death or duly authenticated lists of the dead. They shall
likewise collect and forward through the same bureau one half of a double identity
disc, last wills or other documents of importance to the next of kin, money and in
general all articles of an intrinsic or sentimental value, which are found on the dead.
These articles, together with unidentified articles, shall be sent in sealed packets,
accompanied by statements giving all particulars necessary for the identification of
the deceased owners, as well as by a complete list of the contents of the parcel.

Article 17:

Parties to the conflict shall ensure that burial or cremation of the dead, carried out
individually as far as circumstances permit, is preceded by a careful examination,
if possible by a medical examination, of the bodies, with a view to confirming
death, establishing identity and enabling a report to be made. One half of the
double identity disc, or the identity disc itself if it is a single disc, should remain
on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for
motives based on the religion of the deceased. In case of cremation, the
circumstances and reasons for cremation shall be stated in detail in the death cer-
tificate or on the authenticated list of the dead.

They shall further ensure that the dead are honourably interred, if possible
according to the rites of the religion to which they belonged, that their graves are
respected, grouped if possible according to the nationality of the deceased,
properly maintained and marked so that they may always be found. For this
purpose they shall organize at the commencement of hostilities an Official Graves
Registration Service, to allow subsequent exhumations and to ensure the identifi-
cation of bodies, whatever the site of the graves, and the possible transportation
to the home country. These provisions shall likewise apply to the ashes, which
shall be kept by the Graves Registration Service until proper disposal thereof in
accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these
Services shall exchange, through the Information Bureau mentioned in the second
paragraph of Article 16, lists showing the exact location and marking of the
graves together with particulars of the dead interred therein.

The meaning of these articles is perfectly clear. The obligation to record any
particulars which may assist in the identification of the wounded, sick and
dead of the adverse party is absolute and admits of no exceptions. So is the obligation to forward this information to the power on which the victims depend – their own country or that of the armed forces to which they belonged. Information on graves must be given as soon as circumstances permit, and at the latest when hostilities end.

The first duty assigned here to the ICRC is that of liaison. Information on wounded, sick and dead military personnel and on the location of their graves must be sent via the Protecting Powers safeguarding the interests of the parties to the conflict, and also via the Central Tracing Agency, to the victims’ countries of origin or respective authorities. The Agency will record and keep on file all the information it passes on, so that it can answer queries from the authorities and families concerned. Articles found on the dead, including one half of the double identity disc and articles of value, must be forwarded via the Protecting Power or the Central Tracing Agency.

But the Agency is not content to act merely as a relay. Whatever the care taken to identify the wounded and dead, there are unfortunately always military personnel who remain unaccounted for: soldiers buried by the collapse of a trench, for instance, or blown to pieces by a shell. For some of the enquiries it receives, therefore, the Agency will find no information in the lists of prisoners of war required by Article 122 of the Third Convention, or in the lists of wounded and dead required by Articles 16 and 17 of the First Convention. It will therefore have to investigate each of these cases. The First Convention mentions no such contingency, but in fact provision is already made for it in Article 122 of the Third Convention, requiring National Information Bureaux to reply to any request for information concerning prisoners of war; and until their fate is definitely known any persons listed as missing may be prisoners of war. Anyway, the practice is so well established that it is unquestionably the ICRC’s legitimate responsibility.

ICRC investigations entail meticulous enquiries of official departments and bodies such as town councils, parishes, local Red Cross and Red Crescent sections and hospitals. However, the only people who can give any information about a missing man’s last moments are often his fellow soldiers, if they can be found, and the ICRC made many ‘regimental enquiries’ for this purpose in both world wars. Such investigations call for patience, ingenuity and scrupulous attention to detail, and are absolutely necessary although the results are all too often disappointing. Anybody who has seen the distress of a missing person’s family knows how much it means to them to receive even the slightest news of their loved one, even when – as is all too often the case – it merely confirms that person’s death.

Articles 16 and 17 of the First Convention are clear, and the obligations they impose on belligerents are unlikely to conflict with military necessity. It should therefore not be difficult to apply them in international armed
conflicts. Yet there have in fact been many difficulties, three of which deserve particular mention.

Most conflicts since the Second World War have been in Third World countries whose soldiers were often not issued with the identity disc mentioned in Article 16. In this respect, therefore, they were no better off than European soldiers in the first half of the nineteenth century; the dead were generally buried without it being possible to identify them, and there were more missing soldiers than identified dead. In these circumstances the countless a posteriori enquiries to the Central Tracing Agency were bound to give disappointing results.

The Twenty-fourth International Conference of the Red Cross, held in Manila in November 1981, adopted a resolution that underscores the importance of identity discs:

The XXIVth International Conference of the Red Cross, considering that, in several situations of armed conflict, the identification of members of the armed forces killed on the battle-field is made extremely difficult for lack of identification documents, recalling that Articles 16 and 17 of the First Geneva Convention of 12 August 1949 provide for identity discs to be worn by members of the armed forces to facilitate their identification in case they are killed and the communication of their deaths to the Power on which they depend,

1. urges the Parties to an armed conflict to take all necessary steps to provide the members of their armed forces with identity discs and to ensure that the discs are worn during service,
2. recommends that the Parties to an armed conflict should see that these discs give all the indications required for a precise identification of members of the armed forces such as full name, date and place of birth, religion, serial number and blood group; that every disc be double and composed of two separable parts, each bearing the same indications; and that the inscriptions be engraved on a substance as resistant as possible to the destructive action of chemical and physical agents, especially to fire and heat,
3. reminds the Parties to an armed conflict that one half of each disc must, in case of death, be detached and sent back to the Power on which the member of the armed forces depended, the other half remaining on the body,
4. notes that the International Committee of the Red Cross is prepared to provide models to States asking for them.9

This resolution, although important, omits the essential requirement that the identity disc should be engraved and issued as soon as the holder enters the armed forces, and not merely when the first salvo lands. There is no doubt at all that identity discs must be issued to all soldiers in peacetime. When war breaks out, it is too late to provide each member of the armed forces with their identity disc, since the troops must be deployed as quickly as possible.

Furthermore, in many post-Second World War conflicts the belligerents did not have in place the National Information Bureaux prescribed by Articles 122 of the Third Convention and 136 of the Fourth Convention. This is a
serious omission; these bureaux are, so to speak, the Agency’s natural partners, for their job is to centralize all individual data that must be passed on to the Agency.

The ICRC did what it could to improve matters by opening Central Tracing Agency branch offices in the countries concerned; these offices to some extent took over the tasks normally assigned to National Information Bureaux, or provided National Societies with the services of specialists who could help to set one up. Although these expedients have proved very useful, they lead to confusion between the tasks of the Agency and those of the National Information Bureaux. In the long term this could cause serious difficulties.

Lastly, there is the deplorable fact that in several recent conflicts, such as those in Korea and Vietnam and the Arab-Israeli conflict of October 1973, some of the belligerents deliberately refused to disclose the identity of the prisoners, wounded and dead who had fallen into their hands. This was a flagrant violation of the Conventions, and an attempt, unjustifiable on any grounds, to make capital out of the mental anguish of the families concerned.

The Twenty-second International Conference of the Red Cross, meeting in Teheran in November 1973, unanimously adopted a resolution (no. V) inviting parties to armed conflicts to help locate the graves of the dead, provide information about persons reported missing, and co-operate with the ICRC in accounting for the dead and missing.10

In its Resolution 3220 adopted on 6 November 1974, the General Assembly of the United Nations unreservedly endorsed Resolution V of the Teheran Conference, adding that ‘the desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible’. The Assembly also stressed that ‘provision of information on those who are missing or who have died in armed conflicts should not be delayed merely because other issues remain pending’.11

Lastly, by explicitly reasserting ‘the right of families to know the fate of their relatives’ the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law definitely confirmed the fundamental principle underlying this whole question.12

The Conference also pointed out that each party to a conflict is under the obligation, ‘as soon as circumstances permit and at the latest from the end of active hostilities’, to search for persons reported missing by an adverse party. It laid down rules of procedure for this purpose and adopted detailed regulations on mortal remains and graves.13

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Article 3 of the 1949 Conventions, which concerns non-international armed conflicts, contains no explicit requirement that the wounded and dead shall be identified and their families informed. To fill this gap the ICRC inserted a provision to that effect in the draft of Protocol II.14 In spite of its obvious
humanitarian value, this draft article was unfortunately dropped when the Diplomatic Conference adopted Protocol II in plenary session.15

There is nevertheless no legal lacuna here, for the above-mentioned resolutions of the Teheran and Manila Conferences and Resolution 3220 (XXIX) 1974 of the General Assembly of the United Nations do not distinguish between international and internal conflicts; moreover the fundamental principle confirmed by the 1974–7 Diplomatic Conference, namely that families are entitled to know the fate of their relatives, undoubtedly applies to all armed conflicts.

Lastly, Article 3 of the 1949 Conventions and Article 4 of Protocol II require that persons who do not take a direct part in hostilities, or who have ceased to do so, shall in all circumstances be treated humanely. Indubitably, to refuse families available information on their dead or missing relatives is a form of mental torture and is incompatible with that obligation.

Accordingly, although humanitarian law leaves the belligerents in internal conflicts entirely free to choose the procedure and means, it does impose on them at least the obligation to identify the wounded and dead where means of identification exist, and to inform their families. Undoubtedly also, humanitarian law authorizes the ICRC to offer its services and those of the Central Tracing Agency for that purpose.

The difficulty is that in such conflicts combatants rarely carry identity discs, and many of them try to conceal their real identity under various assumed names.

In this respect and in spite of all statements to the contrary by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, wars of national liberation are in fact more akin to internal than to international conflicts, for ‘freedom fighters’ are not often known by their real names. Still less often do they carry any means of identification.

In such circumstances, whatever the Central Tracing Agency can do to trace missing combatants is not likely to succeed.

* * *

To conclude, the First Convention and Protocol I give the ICRC definite responsibilities in tracing missing persons. They require it to transmit lists and other means of identifying the wounded, sick and dead members of the armed forces who have fallen into enemy hands; to send on objects of value found on the dead, and in particular one-half of their identity disc; to record all data forwarded via the ICRC; and where necessary to enquire into the fate of missing persons.

Neither Article 3 nor Protocol II impose any definite tasks on the ICRC in non-international armed conflicts, but the Conventions and Protocols undeniably authorize the ICRC to offer its services and those of the Central Tracing Agency to set up information bureaux and pass on any information which the belligerents may choose to give them.
That is what has in fact happened. The ICRC has opened tracing offices in many non-international armed conflicts, for example in Cyprus in 1964,16 in Eastern Pakistan in August 1971,17 in Lebanon in 1975,18 in Chad in 1978,19 in Nicaragua in 1979,20 and in El Salvador in 1980.21

Tracing wounded and sick members of the armed forces is not the Central Tracing Agency’s only function. It has no responsibility towards wounded collected by their own forces, but it does try to keep track of captured wounded and sick military personnel throughout their captivity and monitor their situation. Thus it is responsible for sending on capture cards, notifying changes of address and transfers, passing on family messages, and transmitting the death certificates of military personnel who die in captivity. It may also be asked to enquire into the state of health of wounded and sick military personnel in enemy hands.

The Agency has to discharge the same duties for medical and religious personnel in enemy hands. Many doctors and other medical personnel cannot show any identity documents, having lost them in action or been deprived of them, contrary to the relevant provisions of the Geneva Conventions, when captured. Being unable to prove their status, they cannot get the treatment that is their due – either repatriation during hostilities, or the facilities they need to look after their fellow prisoners if they are retained to do so. The Agency will often be asked to make the appropriate enquiries and send the documents enabling them to claim the status to which they are entitled under the Conventions.22 In both world wars the Agency frequently had to take such steps, because of the long hostilities and the large number of medical personnel in that situation.23

Under Article 14 of the First Convention however, wounded and sick military personnel in enemy hands are prisoners of war and are entitled to be treated as such. Except for the initial notification required under Article 16 of the First Convention, any activities by the Central Tracing Agency on their behalf will be the same as for all other prisoners of war. The Agency’s work for wounded and sick members of the armed forces and medical personnel in enemy hands will accordingly be dealt with in the chapter on its activities on behalf of prisoners of war and civilian internees, and not in the present chapter.24

Notes

1 Gradimir Djurovic, The Central Tracing Agency of the International Committee of the Red Cross, Henry Dunant Institute, Geneva, 1986, p. 14. At the end of the Italian campaign of 1859, although the French army had been constantly victorious, its records listed 2664 missing and 2536 identified dead. The Austrian army had more than 17,000 missing (including 5000 to 6000 prisoners of war) and 5416 identified dead. Dr J.-C. Chenu, Statistique
médecin-chirurgicale de la campagne d’Italie en 1859–1860, Librairie militaire de J. Dumaine, Paris, 1869, pp. 851–3. A communication from the Minister of War of the Austrian Empire to the First International Conference of Relief Societies, meeting in Paris in August 1867, stated that eight months after the Austro-Prussian War of 1866, which lasted only a few weeks, eighty-four officers and 12,277 non-commissioned military personnel of the Austrian army were still listed as missing, and it was not known what had happened to them (Conférences internationales des Sociétés de Secours aux Blessés militaires des Armées de Terre et de Mer, tenues à Paris en 1867, second edition, Imprimerie Baillière & fils, Paris, 1867, part II, pp. 90–1).


3 Conférences internationales des Sociétés de Secours aux Blessés militaires des Armées de Terre et de Mer, tenues à Paris en 1867, part II, p. 143.

4 Ibid.


12 Protocol I, Article 32.

13 Protocol I, Articles 33 and 34.


22 Convention I, Article 40, paragraph 4.

24 For these activities, see Part V, Chapter II below, pp. 555–79, in which institutional matters relating to the Central Tracing Agency are also considered.

References

CHAPTER III

RELIEF OPERATIONS FOR WOUNDED AND SICK MILITARY PERSONNEL IN WAR ON LAND

To every thing there is a season,
and a time to every purpose
under the heaven:
A time to be born, and a time to die;
a time to plant, and a time to pluck up
that which is planted;
A time to kill, and a time to heal.

The responsibility for collecting wounded and sick members of the armed forces and giving them the care their condition requires lies first and foremost with the military medical services of the belligerent states and then, in an auxiliary capacity, with the National Red Cross or Red Crescent Societies. Those services and National Societies are the principal beneficiaries of the immunities conferred by the First Geneva Convention.

However, the violence of war is such that the resources of National Societies of belligerent states and even the best equipped medical services are almost always inadequate to cope with the huge numbers of casualties, and help from other countries spared by the war is needed. That same spirit of solidarity, which unites all National Societies and transcends all borders, is one of the most fundamental characteristics of the International Red Cross and Red Crescent Movement.

Help from neutral countries may be of two kinds, each complementing the other: material aid such as medicines, blood or blood plasma, dressings, surgical instruments, vehicles and the like; and the provision of qualified personnel, mainly doctors and nursing staff.

The importance of relief operations launched by neutral countries cannot be sufficiently stressed. More than once, the pitifully small resources of official services have been highlighted by the modern ambulances and field hospitals dispatched to the theatre of war by the National Societies of neutral countries.

The Geneva Conventions have only very incompletely regulated assistance by neutrals. Yet this is not surprising, for the purpose of the Conventions is to regulate reciprocal relations between belligerents, not between belligerents and neutrals. The legal questions raised by such assistance, and especially
problems relating to relief operations which the ICRC may be called upon to support, will therefore be reviewed as much on the basis of previous practice as by reference to the Conventions.

To start with, however, the basic principles governing all such questions will be recalled.

These principles have not varied. The first is that wounded and sick members of the armed forces must be collected and given the care required by their condition. The second is that all such care must be impartial. These principles were established by the original Geneva Convention of 22 August 1864, Article 6 of which begins: ‘Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for’.

Article 15 of the First Geneva Convention of 12 August 1949 echoes this as follows:

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

In addition, Article 10 of Protocol I stipulates that:

All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

These principles also apply to non-international armed conflicts. Thus Article 3 of the 1949 Conventions states: ‘The wounded and sick shall be collected and cared for.’ Article 7 of Protocol II further stipulates that:

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.
The obligation to give such care, and to do so with complete impartiality, is thus firmly rooted in conventional law and in the practice of more than one hundred years, and applies both to international and internal conflicts.

Admittedly, parties to conflict have no legal obligation to accept assistance offered by neutrals, as Article 9 of the First Convention makes amply clear in so far as ICRC assistance is concerned, but neither are they completely free to refuse it. It would indeed be unthinkable for wounded and sick military personnel to be deprived of medical care merely because certain belligerents had refused the proffered assistance.1

For that matter, it is hard to see what belligerents could gain by refusing medical assistance offered through ICRC channels, as they would be the first to suffer from any such refusal.2

The application of the above principles will now be examined, and for this the provision of material aid must be distinguished from that of medical personnel.

Article 5 of the resolutions of the Geneva International Conference of October 1863, at which the Red Cross movement came into being, provided that ‘in time of war, the Committees of belligerent nations ... may call for assistance upon the Committees of neutral countries’.3

This provision makes no reference to the International Committee, which was expected to be dissolved soon afterwards. It was assumed that the relief societies of belligerent countries would take up direct contact with those of neutral countries and that international assistance would be regulated by bilateral agreements.

Contrary to expectations, the relief societies of belligerent states preferred from the start to contact the Geneva Committee, which could appeal to all neutral societies. This system was adopted in the Austro-Prussian War of 1866 and is still in force today.4 The International Committee was thus given the responsibility of asking for help from the entire movement. This is the regular practice. In every conflict the International Committee has informed the National Societies and governments of neutral states of the victims’ needs, and has appealed to those spared the ravages of war to show solidarity with its victims.

For many years the International Committee merely passed on the lists of needs it received from the National Societies of belligerent countries, but since the Second World War it has generally sent out a mission to make a quick independent evaluation of needs. This has enabled it to back up its appeals with detailed firsthand information.

To avoid overlapping and wasted effort it was equally necessary to centralize information and the dispatch of relief supplies to some extent, but for this the appropriate mechanism first had to be set up.

The Second International Conference of Relief Societies, held in Berlin in 1869, did so. In Resolution IV/3 it stipulated that:
In time of war, the International Committee shall ensure that a liaison and information office is set up in a suitably chosen location, which shall facilitate, in every possible way, the exchange of communications between committees and the sending of relief supplies.5

From the Franco-Prussian War of 1870 onwards the International Committee regularly acted in this way as a clearing house for information and relief. At the beginning of the Second World War it formed a separate Medical Division to organize all medical aid. In the long series of subsequent conflicts this division has gained unrivalled experience and reached a high level of professional expertise that is respected by all.

Relief is not centralized solely for the sake of efficiency. It is also a means of ensuring Red Cross impartiality, since the same body is responsible both for collecting information on needs and apportioning donations fairly.

This means that an equitable formula for the allocation of relief supplies has to be found, as became clear in the very first weeks of the war of 1870. It had originally been intended to share out the donations equally between the belligerents, but before long this arrangement had to be dropped because mathematical equality led to absurd results – the German army, winning battle after battle, was collecting nearly all the wounded of both sides.6 Thus it was soon realized that the principle of impartiality did not mean mathematical equality, but an equitable allocation of supplies in proportion to needs.

The International Committee has regularly applied this principle of distribution in all conflicts since 1870, the sole exception being the Spanish Civil War, when the rule of mathematical equality was resumed for reasons peculiar to that conflict.7 As Spain was divided at the time into two halves, the needs of each side were more or less equal, so that there was no real contradiction between the rule of mathematical equality and the principle of apportionment according to needs.

The kind of relief sent evidently depends on the needs reported. It will consist mainly of medicines, blood and blood plasma, dressings, surgical instruments and perhaps stretchers, bedding, tents and blankets, ambulances and the like.

On the basis of its experience in carrying out relief operations, mainly in the Third World, the ICRC’s Medical Division has prepared standard kits of medicines and medical material providing a selection of products adapted to the ability of the recipients of medical assistance to use them. The contents vary, depending on whether they are intended for hospitals, dispensaries or infirmaries, etc. Each pack contains a small range of basic medicines, with exact instructions for their use, written wherever possible in the language of the country of destination.8 There is admittedly no such thing as a perfect standard kit, but the system has given excellent results and saves time at the beginning of emergency operations.

The volume of relief sent depends on the needs reported and the resources
made available to the ICRC. It can range from a few cartons of medicines to a complete field hospital with all the equipment (operating theatre, tents, stretchers, electricity generator, and so on) needed to provide emergency aid in conflict situations. The ICRC’s responsibilities go no further. Long-term needs, development of the national medical and hospital infrastructure and assistance to victims of natural disasters are the responsibility of other institutions, such as the World Health Organization and the International Federation of Red Cross and Red Crescent Societies.

Medical supplies are best sent by air. In an emergency, the ICRC does not hesitate to charter planes to fly in large quantities as quickly as possible. It did so in particular during the following conflicts:

- the events in Hungary (October 1956);
- the Suez conflict (November 1956);
- the Middle East conflicts (June 1967 and October 1973);
- the civil war in Jordan (September 1970);
- the conflict between India and Pakistan (December 1971);
- the Cyprus conflict (July–August 1974);
- the civil war in Lebanon (many relief operations from 1975 to 1990);
- the Ogaden conflict (in September 1977);
- the civil war in Chad (several relief operations from 1978 to 1983);
- the civil war in Nicaragua (in July 1979).

The scale of these operations has steadily increased. For example, after heavy fighting in Lebanon in the summer of 1982 the ICRC sent out three fully-equipped field hospitals, nearly 2500 litres of fresh blood, more than 4000 standard kits of medicines and other medical supplies, and seventy-three ambulances to replace Lebanese Red Cross or ‘Palestinian Red Crescent’ vehicles damaged or destroyed during the clashes.

The First Geneva Convention does not specify that medical supplies destined for the treatment of wounded and sick military personnel must be exempt from customs duty, doubtless because this was taken for granted. And indeed this exemption has regularly been accorded since the 1870 Franco-Prussian War. It is moreover hardly likely that a belligerent would want to charge duty on relief supplies from which it is the first to benefit.

Lastly, since the ICRC has no revenue of its own but depends on funds placed at its disposal, it must be able to account for the use made of them. The institutions receiving its assistance therefore have to send in reports detailing what they have done with the supplies received, and ICRC delegates must be able to verify and confirm that these supplies are being put to good use. The intention is not to make a pernickety check that would be both irritating and useless, but to establish a form of co-operation between organizations that have the same goal.

However, the very nature of medical aid precludes its use for the benefit of combatant forces, and the ICRC is therefore not required to check as stringently as might be necessary for other forms of relief.
Throughout the Vietnam war, for example, it was consequently able to send large amounts of medical aid to the North Vietnamese Red Cross Society, including two field hospitals (sixty and 120 beds), although the ICRC itself could not check on the use made of them because it was not represented in Hanoi.12

So even though the First Geneva Convention does little to regulate the provision of medical aid intended for the treatment of wounded and sick members of the armed forces, there are generally no serious legal problems. These are much more likely to be financial, logistic and operational, starting with the problems of running an efficient, well co-ordinated operation in the turmoil of war.

Legal difficulties that may paralyse the ICRC’s activities are likely to crop up only when the passage of relief supplies destined for one party to a conflict is subject, as in a naval blockade or siege, to the consent of the adverse party.13

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Is a belligerent state which attempts to obstruct the enemy’s trade and cut off its supplies entitled to intercept consignments of medical aid exclusively intended for the treatment of the wounded and sick, or must it allow such consignments to proceed unhindered?

Unfortunately, the First Geneva Convention does not settle this question. Since it arises mainly in relation to transport by sea, the answer must be sought in the laws of naval warfare.

Under Article 29 of the London Declaration concerning the Laws of Naval War of 26 February 1909, ‘Articles serving exclusively to aid the sick and wounded’ are explicitly included among the articles which ‘may not be treated as contraband of war’.14 Unless, therefore, the blockading power is in urgent need of them for its own medical services and is prepared to pay fair compensation, it is bound to allow such articles free passage and they are not liable to capture or condemnation, i.e. lawful expropriation.

Although the Declaration of London was never ratified, it is generally accepted as reflecting the law in force when it was adopted,15 but since then much of it has fallen into disuse because of countless violations during the two world wars. By and large, however, its Article 29 appears to have been respected.

Furthermore, Article 38 of the Second Geneva Convention stipulates that:

Ships chartered for that purpose shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them or to seize the equipment carried.

By agreement amongst the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose free access to the equipment shall be given.
Does this article authorize the blockading power to prohibit any consignment of medical aid to the adverse party, or does it only allow that power to have a say in the practical arrangements and proposed route, since the free circulation of medical aid is an accepted principle? Article 38 appears to support either interpretation.

However, an examination of the preparatory work removes all doubt, for Committee I of the 1949 Diplomatic Conference states in its report that:

The routes and duties of such transports must be notified to the adverse Power and approved by it. That Power may in no case regard the medical character of the equipment transported as a reason for refusing its approval. Only the conditions of the voyage, e.g. route, destination, etc., may be contested.16

The blockading power is therefore bound to allow free passage to exclusively medical relief supplies. It is free to discuss only the ‘conditions of the voyage’, that is, the date of the voyage and the route, speed and markings, etc. of the vessel.17 This was the point of view adopted by the ICRC in both world wars,18 and in the only two naval blockades proclaimed since 1945.

For instance, as soon as the civil war in Nigeria and the blockade on its secessionist Eastern Region began, the ICRC asked the Lagos government to allow the passage of medical aid to beleaguered Biafra. The first consignments of medicines and dressings, in the form of standard medical kits, were dispatched by air in July 1967. The ICRC expanded its medical operation in proportion to the growing number of military and civilian wounded and sick on both sides, until a plane placed at its disposal by the Swedish Red Cross was shot down on 5 June 1969, forcing the ICRC to end its airlift.19

The ICRC did not need to draw attention to the principle of free passage for medical supplies when an embargo was imposed on Iraq following its occupation of Kuwait, since the relevant Resolution 661 (1990) adopted by the Security Council of the United Nations on 6 August 1990 expressly excluded from it ‘supplies solely for medical use’, whether destined for the treatment of wounded and sick military personnel or of civilians.

In spite of the air strikes on Iraqi territory from 17 January to 28 February 1991, the ICRC was able to organize three relief convoys from Iran to Baghdad carrying a total of 44 tonnes of medical supplies (medicines, dressings, perfusions and rehydration salts). Some of these relief supplies were donated by National Red Cross and Red Crescent Societies, in particular the Iranian Red Crescent. The belligerent states and the committee set up by the Security Council to monitor the application of the economic sanctions against Iraq were notified of each convoy.20

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Do the above conclusions also apply to relief consignments to a besieged area? Not necessarily, for the law applicable to siege warfare is not identical with that governing naval blockades.
The passage of relief supplies to a besieged area is regulated by Article 15, paragraph 3, of the First Convention:

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

The wording of this article is clear: the commander of the besieging forces may allow relief supplies to pass through his lines to the besieged area, but he is not bound to do so. Relief may therefore be forwarded only at his discretion and by agreement. Nevertheless, as the following examples of ICRC practice show, this is not a futile provision.

During ICRC relief operations in spring 1945 for the civilian population in and around St Nazaire, La Rochelle, Lorient and Dunkirk, where large German garrisons had set up strongholds when France was liberated, the garrison commanders asked to be given medical supplies also for the treatment of seriously wounded German soldiers in hospital there. The ICRC obtained the French government’s consent, but the war ended before the consignments had left Germany.21

In the Palestine conflict (1948–9) the ICRC delegation was able to send urgently required medical supplies to the Egyptian forces surrounded in the Faluja pocket.22

In the civil war of summer 1958 in Lebanon the ICRC delegation organized several operations, with the agreement of all parties concerned, to take in much-needed medical supplies to hospitals and clinics in the rebel-held areas. The situation was particularly critical in the Chouf mountains, where a population of over 100,000 had only a single doctor with nothing but the most basic equipment, who was driven to the extremity of performing major operations such as abdominal surgery without anaesthetics on a kitchen table. With the consent of the competent authorities the ICRC delegates successfully delivered several consignments of medical aid, as well as enough equipment to install a small field hospital in Muktara. A Lebanese doctor and nurse joined one of the ICRC convoys in order to get through to Muktara, and stayed on there.

When Tyre, Sidon and Tripoli were in insurgent hands and cut off from the rest of the country, ICRC delegates also took in supplies to hospitals and clinics there.23

At the end of the Arab-Israeli war of October 1973 the Third Egyptian Army was completely encircled in the Sinai and its supply lines were severed. As mentioned earlier, the wounded – of whom nearly one thousand had been transferred to the Suez hospital – were in a desperate plight; medical stocks were running out and it was impossible to give blood transfusions. On 26 October the ICRC delegates took in 200 litres of fresh blood and 200 units of blood plasma, followed by another 117 litres of blood and 200 units of plasma two days later, to the Third Egyptian
Army’s medical service. All this material was supplied by the Magen David Adom relief society in Israel. It was flown to Ras-el-Sudr on board a plane provided by the Israeli authorities, then transported overland to the cease-fire lines, where ICRC delegates handed it over to Egyptian Army medical officers.

Also on 26 October, the ICRC delegates in Cairo managed to take in a large convoy of medical aid to the hospital in Suez, which was likewise an enclave behind Israeli lines. However, further relief operations planned for the next few days had to be cancelled, because the Israeli government refused to allow any more convoys through until Egypt complied with the Third Geneva Convention. ICRC delegates were not able to resume operations until 11 and 12 November.\textsuperscript{24}

The civil war which ravaged Lebanon from 1975 to 1990 was from the outset a return to siege warfare. The ICRC delegation repeatedly had to act as an intermediary between the various warring parties in order to supply the hospitals and clinics of besieged towns, as in the siege of west Beirut by the Israeli army in the summer of 1982, the siege of Tripoli by dissident Fatah forces in the autumn of 1983,\textsuperscript{25} and many other cases. The importance and difficulty of these operations cannot be overestimated. Besides requiring the prior consent of all parties, the ICRC delegates had to cross the lines in places where commanders often had only nominal control over their troops and snipers had long become convinced that they could operate with complete impunity.

* *

Relief supplies will be of little use unless there are enough qualified medical personnel to care for the armed forces’ wounded and sick. But however many there are, they will never be adequate in number and they will still need neutral help to cope. Provision for such help was made from the start: even more than the boxes of dressings and bales of lint, the presence of volunteers from neutral countries who come to tend the wounded on the battlefield has given eloquent expression ever since to the ideal of international solidarity symbolized by the red cross emblem. Dunant himself, caring for the wounded at Solferino, had shown them the way.

However, before these volunteers could help the wounded their own safety had to be assured, and any suspicion aroused by the presence of foreign civilians on the battlefield had to be dispelled.

This was done by establishing a dual equivalence of status: volunteers from neutral Societies were equated with volunteers from National Societies of belligerent states, who were themselves integrated in the armed forces’ medical services. In this way volunteer medical personnel, whether from the National Societies of belligerent or neutral states, were placed under the control of the military authorities and entitled to the same protection as the official medical services.
This system, which was introduced by the Diplomatic Conference of 1864, was confirmed by the 1949 Conventions. Article 27 of the First Convention provides that:

A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict.

The neutral Government shall notify this consent to the adversary of the state which accepts such assistance. The Party to the conflict who accepts such assistance is bound to notify the adverse Party thereof before making any use of it.

In no circumstances shall this assistance be considered as interference in the conflict.26

At first sight, this organization of voluntary assistance does not call for intervention of any kind by the ICRC. This was also the point of view of the Geneva Committee when doctors and other medical personnel asked to serve under its authority; it considered that the Central Committees of the belligerent nations were alone responsible for co-ordinating voluntary assistance in their respective fields of action, and that it was not competent to do so.27

As time went on, however, it became clear that this way of organizing international relief had its disadvantages. Neutral Societies would often have preferred to lend their volunteers to an international humanitarian institution rather than to the National Society of a belligerent state. Besides, National Societies receiving the help of volunteers from abroad were not always able to direct them to the best possible effect. In the Italo-Ethiopian War, for example, their work was largely co-ordinated by the ICRC delegates, acting on behalf of the Ethiopian Red Cross.28

Above all, this way of organizing voluntary assistance was likely to be totally impracticable in a non-international armed conflict. In some countries divided by civil war, the National Society seemed to have become completely identified with one of the warring parties, so that neutral Societies, fearing to be accused of taking sides, hesitated to lend their personnel to it. In other cases the National Society was itself divided, drawn into the chaos engulfing the state and in no position to direct assistance from abroad.

Yet voluntary assistance had to be co-ordinated, and as early as 1921 the Red Cross decided to entrust this responsibility to the ICRC.29 It is therefore the Committee’s task to co-ordinate all assistance provided by the movement as a whole when the National Society of a country engaged in civil war is unwilling or unable to do so. But since it would evidently be out of the question for the ICRC to act as a state within a state, even if only as regards volunteer assistance, it is accountable for its actions to the warring parties concerned.

Red Cross emergency medical activities since the Second World War have steadily increased, for two reasons: most conflicts during the last fifty years have been in Third World countries whose medical facilities were
overwhelmed by the exceptional demands upon them, and tremendous efforts have been made by National Red Cross and Red Crescent Societies to help the victims. If any proof were needed that the Red Cross ideal of solidarity is still alive, it is there in the Movement’s ability to enlist the services of tens and hundreds of doctors and nurses from all over the world in an incredibly short time.

But then comes the task of co-ordinating the activities of many medical teams from many different countries and speaking several different languages. This task, which is entrusted to the ICRC, is all the more imperative because the teams invariably have to work in the chaotic context of war.

The difficulties are considerable. The ICRC cannot merely allot a specific area to each medical team and leave them all to fend for themselves as best they can. It must first draw up a plan of action taking account not only of local needs but also of security conditions in the field, even though the available information is always fragmentary and often inconsistent. Then after deciding what each team has to do and arranging for liaison with the civilian and military authorities and between teams, it must keep them supplied with medical requisites and food even though communications are frequently disrupted by fighting; evacuate casualties who cannot be given the necessary treatment on the spot; adapt the teams’ assigned duties to changing circumstances and needs; arrange for doctors and nursing staff to be relieved after a tour of duty, and so forth.

The ICRC has proved its ability to do all this in many conflicts, including the civil war in Yemen (1962–70), the Nigerian conflict (1967–70), the civil war in Cambodia (1970–75) and the Lebanese conflict (from 1975 to 1990).

But the most outstanding example is undoubtedly the brief civil war in Jordan in September 1970. Hostilities flared on 17 September, bringing ferocious fighting in the towns, causing innumerable civilian and military casualties, and devastating the country. On 24 September the ICRC appealed to National Red Cross, Red Crescent and Red Lion and Sun Societies, which sent eleven medical teams totalling 516 doctors and nursing staff, plus the necessary technical personnel. Most of the teams were flown to Amman by special plane, the others travelled overland. Within a few days they treated more than 5100 patients, many of them seriously injured. Fighting ceased around the end of September, and the teams were gradually withdrawn in October, November and December 1970. Before leaving they entrusted their last patients to the hospitals and donated most of their material, including three fully equipped field hospitals, to the Jordanian medical services.

This exceptionally large-scale relief operation was directed by an ad hoc co-ordinating group headed by the Secretary General of the Finnish Red Cross, the ICRC retaining overall responsibility for the operation as explicitly requested by the Jordanian government and as required by the Statutes of the International Red Cross.
The special circumstances of the civil war in Yemen (1962–70) led the ICRC to set up a field hospital under its own direct responsibility. Whereas the Republican Army’s medical services had the logistic back-up of the Egyptian Expeditionary Force and could use the medical facilities in the capital and other towns, the Royalist tribes controlling the mountainous regions in central and eastern Yemen were without even a rudimentary medical service. Unless casualties could be evacuated to Najran or Jeddah in Saudi Arabia, there was no means of giving them medical treatment, and few of them could survive the exhausting march to get there. There were no facilities for treatment on the spot.

After sending several mobile medical teams to the Royalist zone, the ICRC decided that the only effective solution was to set up a field hospital within easier reach at Uqhd, on a mountain plateau near the Saudi Arabian border. Its hub was the ‘Clinobox’, a prefabricated, fully equipped surgical unit with an operating theatre; auxiliary units – the X-ray service, laboratories and the out-patients’ clinic – were housed in tents. It was originally intended as a fifty-bed hospital, but often housed more than a hundred in-patients at a time. The clinic treated large numbers of out-patients who came to live near the hospital in tents or caves. Uqhd hospital also served as a logistic base for several mobile medical teams giving emergency treatment near the front line to military or civilian war casualties.

After the Jeddah agreements in late summer 1965 and the resultant ceasefire, Uqhd hospital was gradually phased out, and was closed by the ICRC in November.

Eight medical teams with twenty to twenty-five staff each – doctors, male and female nurses, technicians and aides – worked in turn at Uqhd in extreme climatic conditions, including violent sandstorms and sweltering heat of up to 50°C, to ease the suffering caused by the civil war.

Their achievements were as great as their self-sacrifice. In two years the hospital treated 1700 in-patients; the doctors and nursing staff performed 2088 surgical operations and gave more than 60,500 out-patient consultations. In addition, over 12,000 consultations were given by the mobile medical teams, mostly in inaccessible regions where no European had ever set foot before.32

This precedent was not forgotten. In the fierce fighting that devastated Beirut in spring 1976 the ICRC set up a 120-bed field hospital in an impoverished district of Beirut where the health services were notoriously inadequate. The Danish, Finnish, Norwegian and Swedish Red Cross Societies provided the necessary medical personnel. The hospital was initially housed in tents, but the fighting around it was so intense that it had to be transferred to the basement of a masonry building. Doctors and nursing staff worked there round the clock; within ten months the medical and surgical teams performed 635 major operations and 3266 minor operations, and gave more than 24,000 consultations.33 After the Israeli invasion in summer 1982 the ICRC set up three field hospitals: a 40-bed unit installed in a West Beirut hotel
basement during the siege of Beirut and later transferred to Baalbek, a second unit in Zahle, and a third in Tripoli.34

Similarly, on 15 June 1981 the ICRC opened a 110-bed surgical hospital in Peshawar, Pakistan, for casualties of the fighting in Afghanistan. In July 1983 the ICRC opened a second hospital, with fifty beds, in Quetta, also in Pakistan. Both hospitals were steadily enlarged, reaching a respective capacity of 390 and 250 beds. By 31 December 1990 they had treated 29,425 inpatients, all war casualties; the medical personnel, seconded by several National Red Cross Societies, had performed 59,485 surgical operations and given over 130,000 out-patient consultations.35

More than half the patients treated there had been brought in from first-aid posts dotted along the border with Afghanistan. Run by the ICRC with the co-operation of the Pakistan Red Crescent Society, their purpose was to provide initial treatment near the combat zone and then to evacuate the wounded to the Peshawar and Quetta hospitals. By the end of 1990 the International Committee and the Pakistan Red Crescent Society were running seven first-aid posts in Pakistan, and six other posts were working in Afghanistan.36

Furthermore, after prolonged negotiations the ICRC was given permission to set up a surgical hospital in Kabul. This 150-bed hospital was opened on 1 October 1988 and by the end of 1990 had already admitted 6362 wounded, performed 13,180 surgical operations and treated 17,625 out-patients.37

Evidently, the shortcomings and gaps in the Conventions have not prevented the ICRC from working out its modus operandi. Although the First Geneva Convention of 1949 followed the system established by the 1863 and 1864 Conferences, which made voluntary assistance dependent on a network of bilateral agreements, experience has always shown that it is more efficient to centralize information and relief operations to some extent. Better still, it ensures that the Red Cross is impartial. And surely no organization was better fitted than the Geneva Committee to act as a central clearing house for voluntary assistance in armed conflicts.

So although the First Convention does not assign any particular task in that regard to the ICRC, more and more often the Committee has found itself co-ordinating international operations of the entire Red Cross and Red Crescent Movement comprising not only consignments of relief supplies but also the use of volunteer personnel. Far beyond the limits of the Red Cross, the experience and authority it has acquired in this way are recognized and respected by all.

In some situations the ICRC has found it necessary to carry out relief operations on its own responsibility, for instance to deliver medical supplies to besieged areas. Such operations clearly come well within the role of neutral intermediary assigned to it by humanitarian law. It has also set up field hos-
pitals and medical units in situations such as those in Yemen and Lebanon and on the sidelines of the Afghan conflict.

Moreover the ICRC’s role as guardian of the Fundamental Principles of the Red Cross, assigned to it from the start, is not confined to taking a stand on points of theory and doctrine, but also entails operational responsibilities that it would be unthinkable to neglect.

Yet the ICRC’s activities on behalf of wounded and sick military personnel go further than those described above. Whereas the Committee has no responsibilities towards the wounded and sick who receive treatment after being collected by their own armed forces, it tries to monitor the welfare of those in enemy hands throughout their captivity. Its delegates meet them during visits to their places of internment, and the ICRC may provide them with relief supplies when necessary. Eventually the ICRC may be required to organize their repatriation at the end of hostilities, or before then if they are seriously wounded or sick.

However, under Article 14 of the First Convention and except as regards the treatment their condition may require, the wounded and sick of a bel- ligerent who fall into enemy hands are prisoners of war and must be treated as such. ICRC activities on their behalf will therefore be covered in the chapters relating to prisoners of war in Part Five.

Peace heals many wounds, but not all. Every war leaves permanent wounds, and one of the most grievous is undoubtedly the plight of the maimed and otherwise disabled, who are all too often reduced to a miserable incapacitated existence. The ICRC has done what it could to help them by providing prostheses, crutches, wheelchairs and so on. Its long experience of this work began after the Franco-Prussian War of 1870.38

More recently it has set up workshops to manufacture prostheses for local distribution. This solution is infinitely better than sending out equipment manufactured in industrial countries, because it produces appliances well adapted to local conditions and trains technical and paramedical personnel who will be able to ensure the long-term maintenance of orthopaedic appliances and rehabilitation of patients.

The ICRC opened the first workshop of its own following the civil war in Yemen, which left large numbers of disabled who could not be fitted with appropriate appliances locally. Rather than transfer them to another country, the ICRC thought it would be preferable for Yemen to have a rehabilitation centre which would manufacture prostheses in its own workshop and have the necessary rehabilitation equipment on the spot. The ICRC supplied machines, models and other apparatus, lent the workshop the services of a
prosthetist and physiotherapists, and held courses for Yemeni staff. The centre was opened in Sanaa in August 1970, and worked under ICRC direction for two years, during which 306 invalids were treated and 240 of them were fitted with prostheses. It was then handed over to the Yemeni Ministry of Health, which had undertaken to run it with the support of the World Health Organization.39

In view of the success of this experiment, similar centres were opened in Ethiopia, Angola, Mozambique, Chad, Pakistan, Lebanon, Syria, Sudan, Nicaragua, Zimbabwe, Burma, Afghanistan, Uganda and Vietnam. In the twelve years from 1979 to 1990, they manufactured 37,896 prostheses and fitted them to 26,857 patients. In addition, 11,717 orthotic appliances, 68,487 pairs of elbow-crutches and 3410 wheelchairs were manufactured and issued to patients.40

These centres continue their valuable work long after the ICRC ceases to be responsible for them. For each of them the ICRC has made a point of choosing a national partner, generally the Ministry of Health or the National Society, which will be able to run the centre for a long time to come. Indeed, an ICRC delegate who visited Yemen thirteen years later found that the prosthetic centre opened there in 1970 was not only still in existence but had modernized its equipment and enlarged its capacity.41

To mark the ‘International Year of Disabled Persons’ proclaimed for 1981 by the General Assembly of the United Nations, and pursuant to Resolution XXVII of the Twenty-fourth International Conference of the Red Cross (Manila, 1981), the ICRC established a Special Fund for the Disabled to support long-term projects in aid of war invalids. It has already financed two rehabilitation programmes in Zimbabwe and Burma.42

Lastly, alarmed by the number of patients admitted to its hospitals in Peshawar and Quetta with injuries to the spinal cord, the ICRC decided to open a centre for paraplegics in Peshawar with the co-operation of the Pakistan Red Crescent Society. This 100-bed centre for the treatment of Afghan and Pakistani invalids was opened in February 1984 and by 31 December 1990 had admitted 1837 patients, 1747 of whom had been able to leave it after appropriate treatment and rehabilitation.43

Notes

1 Article 12 of the First Convention strictly forbids wilfully leaving wounded or sick members of the armed forces without medical assistance and care. The primary purpose of this provision is to prevent certain methods of interrogation used in the Second World War, but the prohibition it contains is of general application. It also condemns the refusal of outside assistance if this refusal means that the wounded and sick cannot be given necessary care.

2 To my knowledge, since the Second World War only the National Liberation Front of South Vietnam has refused medical assistance from the ICRC, thereby depriving itself of assistance offered without any strings attached. See Annual Report 1967, p. 27.

3 Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les


6 *Actes du Comité international*, 1871, p. 199.


9 All these operations were reported by press releases, and accounts of them were given in the *International Review of the Red Cross and ICRC Annual Reports*.


13 Strictly speaking, a naval blockade is the prohibition by a belligerent state of all inward or outward communication between the high seas and the enemy coast. The term is also loosely used to mean naval, diplomatic and financial attempts to strangle the enemy’s trade and cut it off from its sources of supply (Charles Rousseau, *Le droit des conflits armés*, Éditions A. Pedone, Paris, 1983, pp. 258–9). In the present chapter it is used in its broadest sense.


15 ‘The Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.’ Preliminary Provision of the Declaration of London, *ibid.*, p. 845.


20 Updates nos. 13, 14 and 15 on International Red Cross and Red Crescent action in the Middle East, 1, 10 and 19 February 1991, ICRC Archives, file 202 (222).


22 This operation is mentioned in the RICR, English supplement, vol. II, no. 1, January 1949, p. 56 and in Monthly Report no. 11 of the Palestine delegation (ICRC Archives, file G. 591 GC, file IV, Guerre civile en Palestine, mission de M. de Reynier, carton 830), which shows that the delegates went to the Faluja pocket to distribute relief supplies and visit Israeli prisoners there. Unfortunately I have not been able to lay my hands on a detailed report of this operation.


24 RICR, no. 152, November 1973, p. 585–6; ICRC Archives, files 280 (43), 264 (43), 200 (43) and 252 (171) – XIIIa.
The assimilation of neutral volunteers to volunteers from National Societies of belligerent states, and of the latter volunteers to members of the armed forces’ medical services, is complete except with regard to the retention of medical personnel. Members of the armed forces’ medical services who fall into the hands of the adverse party may be retained if the state of health and number of prisoners of war so require, whereas personnel and medical units belonging to a recognized relief society from a neutral country may not be retained in any circumstances (Articles 28 and 32 of the First Convention).

Letter to Professor de Hübbenet dated 25 August 1870, reproduced in the Actes du Comité international, 1871, pp. 184–6.

See Book I, Chapter VII, Section 6 above, pp. 145–6.

Resolution no. XIV of the Tenth Conference, Dixième Conférence internationale de la Croix-Rouge tenue à Genève du 30 mars au 7 avril 1921, Compte-rendu, pp. 217–18. The text of the resolution is given in Book I, Chapter IX, Section 5 above, pp. 260–2.


Actes du Comité international, 1871, pp. 242–5.


Alain Garachon, ‘Report on ICRC orthopaedic programmes for war disabled, 1990’, pp. 12–13, ICRC Archives, file 263 (00); The International Committee of the Red Cross and the Disabled, ICRC, Geneva, 1986; Alain Garachon, ‘Thirteen years’ experience in fitting war amputees with artificial limbs’, IRRC, no. 284, September–October 1991, pp. 491–3. Prostheses replace missing limbs or segments of limbs, whereas orthotic appliances stabilize paralysed limbs. The difference between the number of prostheses manufactured in the above-mentioned centres and the number of invalids fitted with appliances is due almost entirely to the prostheses wearing out. After a few years a prosthesis is irreparable and has to be replaced. The same patient will therefore have to have a second prosthesis three to five years after the first. Some patients with multiple mutilations have to wear two prostheses at once.


528th Circular to Central Committees, 20 January 1984, reproduced in IRRC, no. 238, January–February 1984, p. 35; ICRC Archives, file 263 (00).


References

As far as I know, there is no literature on the subject of ICRC relief operations for wounded and sick military personnel in the field.
CONCLUSIONS

There is a striking similarity between the reports of ICRC delegates and Henry Dunant’s moving account. All conjure up terrible visions of overcrowded hospitals, wounded lying crowded together on the ground, festering wounds and dried blood, and the stink of rotting flesh. Of doctors, always too few, overwhelmed by the immensity of their task and worn down by the cruel need to choose between one casualty and another; knowing that the few minutes they spend saving one life will mean the death of another human being for whom equally urgent treatment will come too late. Of the same shrieks and groans, the same unbearable suffering, and the anguish of those left to their fate who know they are soon to die alone and untended.

Since the battle of Solferino humanity has not made equal progress in every field. Nor has it all been true progress. There have been great advances in medicine, but infinitely more in weapons of destruction.

Worse still, the recent discoveries in medicine have hardly reached the Third World, the scene of nearly all wars since 1945, yet the most lethal and destructive weapons are supplied there in abundance.

To cap it all, the unthinkable of a century ago has now become a cruel reality; one city after another is transformed into a battlefield before our very eyes, devastated by the unholy alliance of revolutionary wars and the most sophisticated weaponry.

For all these reasons, and although it must recognize that humanitarian action alone is not enough, the world needs more than ever before the voluntary assistance of the National Red Cross and Red Crescent Societies. Nor can it do without the help of a neutral intermediary, a unique intermediary whose duty it is to remind belligerents of the fundamental humanitarian principles, see to it that they are applied, and lend a helping hand in applying them.
PART FOUR

THE PROTECTION OF WOUNDED, SICK AND SHIPWRECKED MILITARY PERSONNEL IN WAR AT SEA

Toll for the brave -
The brave! that are no more;
All sunk beneath the wave,
Fast by their native shore!
William Cowper,
*On the Loss of the Royal George*, 1791
INTRODUCTION

The principle of the inviolability of wounded and sick members of the armed forces applies to both war on land and war at sea, but its implementation at sea has to be adjusted to the specific conditions of maritime warfare.

Shipwrecked combatants have the same right to assistance as wounded or sick combatants, for the loss of their ship by enemy action has much the same incapacitating effect as injury or illness on the battlefield. So do aircrew whose plane has been shot down.

In war at sea, the hospital ship is vitally important for assistance to wounded, sick and shipwrecked combatants. It is therefore also the key element in the system of protection laid down by the Geneva Conventions.
CHAPTER I

THE PROTECTION OF WOUNDED, SICK AND SHIPWRECKED MILITARY PERSONNEL AGAINST THE EFFECTS OF HOSTILITIES

Under the glassy, cool, translucent wave
John Milton

1. The principle of immunity of wounded, sick or shipwrecked military personnel, and of medical personnel and equipment

The principle that wounded, sick and shipwrecked members of armed forces at sea are inviolable is laid down for international armed conflicts in Article 12 of the Second Convention and Article 10 of Protocol I, and for non-international armed conflicts in Article 3 of the 1949 Conventions and Article 7 of Protocol II. In this respect the Conventions do not distinguish between wounded, sick and shipwrecked military personnel in war on land or at sea; all are inviolable. The relevant provisions of the Second Convention correspond to those of the First Convention, whereas Article 10 of Protocol I and Article 7 of Protocol II apply both to war on land and war at sea.

The provisions for the protection of military medical personnel in war at sea likewise correspond to those applicable to military medical personnel on land.\(^1\) Disembarked medical personnel of naval forces come under the First Convention.\(^2\) Uniformity of treatment is thus ensured.

The similarity of the two sets of legal rules calls for similarity in the ICRC’s interventions. With regard to the principle that wounded and sick combatants and medical personnel and equipment are inviolable, respect for the emblem and the situation of retained medical personnel, the ICRC makes no distinction between war at sea and war on land. Further discussion of these points is therefore unnecessary.\(^3\)

The procedures adopted by the ICRC to deal with complaints concerning the destruction of hospital ships or of medical installations in war on land have also been identical.\(^4\)

Only two questions need closer examination: notification of the commissioning of hospital ships, and verification of their use.
2. Notification of the commissioning of hospital ships

The commissioning of military hospital ships must be notified to the adverse party, in accordance with Article 22 of the Second Convention:

Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.

The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

Hospital ships commissioned by National Red Cross Societies, by other officially recognized relief societies, or by private persons belonging to a belligerent or a neutral state, must be notified in exactly the same way.5

The Convention does not specify the channel to be used to notify the adverse party. The Protecting Powers have usually been requested to do so, and the 1949 Conference appears to have envisaged this solution.6 If there is no Protecting Power the ICRC will generally be the most suitable intermediary.

Previous practice confirms this. In November 1944 the provisional French government requested the ICRC to notify the Reich government and the authorities of the ‘Italian Social Republic’ that the hospital ship Canada was being put into service.7 During the Suez conflict the French government likewise asked the ICRC to advise all belligerents that the hospital ship Marseillaise was being put into service.8

In the Vietnam war the ICRC was asked to notify the commissioning of the hospital ships USS Repose and USS Sanctuary. The North Vietnamese government did not dispute the ICRC’s right to transmit such notifications, but strongly protested against the presence of these ships in Vietnamese territorial waters. The National Liberation Front sent back the first ICRC communication and left the second unanswered.9

In the South Atlantic conflict in spring 1982 the belligerents informed each other via the Protecting Powers appointed to safeguard their interests that they were commissioning their hospital ships. They also notified the ICRC for information purposes.10

3. Verification of the use of hospital ships

In the final analysis, the inviolability of hospital ships depends on the parties’ good faith. The Geneva Conventions do, however, also recognize that belligerents are entitled, subject to the general laws of sea warfare, to verify their
use. The belligerents’ warships accordingly have the right to visit and search belligerent or neutral hospital ships,\(^\text{11}\) to refuse assistance from such vessels, order them off, make them take a certain course, monitor the use of their means of communication and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.\(^\text{12}\) The protection to which hospital ships are entitled may even cease if they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given and has remained unheeded.\(^\text{13}\) In the event of manifest misuse, the vessel may be seized and condemned by a prize court, in which case it becomes the property of the capturing state.\(^\text{14}\)

In practice, however, the belligerents cannot exercise this supervision over each other’s hospital ships unless their naval forces are roughly equal. Otherwise, the only belligerent able to do so will be the one that succeeds in clearing the war zone of all surface vessels belonging to the enemy. War being what it is, the latter will then probably denounce all sorts of nefarious abuses and, since it derives so little benefit from the Convention, will cease to observe it.

That is what happened in the First World War. In January 1917 Germany, alleging that the Allies had made illegal use of their hospital ships to transport troops and munitions, announced that German submarines would henceforth attack without warning all hospital ships encountered in the Channel and Mediterranean.\(^\text{15}\) Several hospital ships were in fact sunk in the next few months. As Allied protests and reprisals proved ineffective, the French government offered as evidence of its good faith to subject all hospital ships flying its flag to supervision by neutral commissioners with full powers to live on board and inspect embarkations and disembarkations. It also asked the ICRC to appoint an ICRC official to inspect Entente hospital ships and ascertain that they were being used in accordance with the Xth Hague Convention.\(^\text{16}\) In the end France, Great Britain and Germany agreed that Spain, the Protecting Power entrusted with safeguarding French interests, should supervise hospital ships sailing in the Mediterranean. Officers of the Spanish Royal Navy went to sea on board Allied hospital ships, whose inviolable character was thereafter scrupulously respected. Unfortunately, despite lengthy negotiations no such agreement was reached for the Atlantic, the Channel and the North Sea, where attacks continued and several hospital ships were lost with all hands.\(^\text{17}\)

Drawing the necessary conclusions, the meetings of experts in 1937,\(^\text{18}\) 1946 and 1947 recommended that the revised Convention should contain a provision allowing for neutral verification and supervision. The result was Article 31, paragraph 4, of the Second Convention:

\[\text{Parties to the conflict may, either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention.}\(^\text{19}\)\]
It must be noted, however, that this is no more than an option open to the belligerents; it cannot on any account be considered mandatory. Hospital ships are inviolable because of their medical assignment, their distinctive markings and their notification as such; not because they have neutral observers on board. In other words, a belligerent could never argue that since there were no neutral observers on board, it did not have to comply with its obligations under the Convention.

The observers’ duties are sufficiently clear from the terms used and the preparatory work at the Diplomatic Conference. They are ‘to ascertain facts and be able to report thereon’. It is their duty to report whether the Convention has been violated or respected, so as to exonerate the captain of a vessel from unfounded charges and thus avoid reprisals. The observers are also entitled to give their opinion, spontaneously or on request, on the attitude to be adopted in certain circumstances. But they are not entitled to give orders to the vessel’s captain, who is solely responsible for his own decisions and must always have complete freedom of action.

The Convention does not say who is to supply the neutral observers. Their duties are, however, entirely covered by the general mandate entrusted to the Protecting Powers by common Article 8/8/8/8 of the Geneva Conventions, which stipulates that the Conventions shall be applied ‘with the co-operation and under the scrutiny’ of those Powers. Requests for neutral observers may therefore first be addressed to them. But the belligerents are nonetheless free to ask the ICRC, either individually or by special agreement, to do so, just as the ICRC is entitled to exercise its right of humanitarian initiative for this purpose.

As far as I know, the only time this provision was applied was during the Falkland Islands/Malvinas conflict in spring 1982, when the United Kingdom and Argentina accused each other of misusing hospital ships for military purposes. One of the parties even threatened to sink a hospital ship which it accused of hampering the movements of its armed forces. Each of the two governments separately approached the ICRC and formally requested it to inspect hospital ships on both sides and verify their use. The ICRC replied that it had only one expert who was sufficiently well qualified to act as a neutral observer in accordance with Article 31, paragraph 4, of the Second Convention, and suggested that the belligerents should approach the Protecting Powers or other institutions in a better position to appoint qualified delegates. It nevertheless agreed to carry out the duties asked of it. In the space of a few days the ICRC expert boarded the six hospital ships (four British and two Argentine) deployed in the South Atlantic and found that all their installations were in conformity with the Second Convention. He also made a number of suggestions that were immediately accepted by the captains of the vessels concerned.

This ICRC operation scotched the suspicions that so nearly prevented the use of hospital ships and even threatened their safety. These vessels played a decisive part in evacuating and giving medical attention to the many soldiers
and crew members wounded in the landings and subsequent fighting.\textsuperscript{23}

In response to a British proposal but without any written agreement to that effect, both parties recognized a neutral zone at sea. Known as the ‘Red Cross Box’, it was approximately twenty-five nautical miles in diameter and situated thirty miles to the north of the archipelago; the hospital ships of both sides could moor there in safety without hindering the movements of war vessels, and were near enough to the hostilities to provide assistance at short notice. This neutral zone was also the scene of several operations in which the British and Argentine hospital ships exchanged severely wounded personnel.\textsuperscript{24}

This innovation is not specifically provided for in the Second Convention, but is fully in accordance with the spirit of that Convention and shows how adaptable humanitarian law can be when the parties to a conflict are prepared to apply it in good faith.

Article 31, paragraph 4, of the Second Convention does however raise theoretical and practical problems that the ICRC cannot ignore.

- The greatest practical difficulty is to recruit experts sufficiently well versed in seamanship to ascertain that the Conventions are being strictly observed.
- The most delicate theoretical question is what the ICRC should do if it discovers that the inviolability of hospital ships is manifestly being misused to commit acts harmful to the adverse party. When requested to supply the neutral observers mentioned in Article 31, paragraph 4, of the Second Convention, the ICRC is certainly entitled to assume that the warring parties intend to carry out their obligations under the Conventions in good faith. In agreeing to supply observers it is counting on a relationship of mutual trust. However, knowing the very nature of war it must no less certainly consider, if only as a hypothesis, that its delegates might come across forms of grave misuse clearly incompatible with the status of a hospital ship. Obviously the ICRC could not use its authority to hush them up. If its protests were disregarded, its only possible course would be to withdraw its delegates from the vessel and notify the belligerents of its decision. The adverse party would then certainly consider that the situation referred to in Article 34 of the Second Convention had arisen and that it was therefore within its rights, after giving due warning which had gone unheeded, to conclude that the offending vessel was no longer entitled to the protection conferred by the Convention.

Clearly, in such serious circumstances it is essential to avoid any ambiguity.

Notes

1 Articles 36 and 37 of the Second Convention. Under Article 36, the crews and medical personnel of hospital ships may not in any circumstances be captured or retained during the time they are in the service of those ships, whether or not there are wounded and sick on
board, for the simple reason that a hospital ship without its crew and medical personnel is in effect no more than a wreck.

2 Article 37, paragraph 4, of the Second Convention.

3 For further information, see Chapter I, Part III, above, pp. 470–80.


5 Articles 24 and 25 of the Second Convention.


7 ICRC Archives, file CR 97.

8 ICRC Archives, file 240 (43).

9 ICRC Archives, files 202 (69) – file IIa, and 240 (69). The ICRC was also requested by the government of the Federal Republic of Germany to notify the dispatch to Vietnamese waters of the Helgoland, a hospital ship chartered by the German Red Cross to care for wounded and sick civilians (and therefore to be regarded as a civilian hospital as defined by Article 18 of the Fourth Convention, rather than as a hospital ship as defined by Articles 22 ff. of the Second Convention).

10 At the time, British interests in Argentina were represented by Switzerland, and Argentine interests in the United Kingdom by Brazil. ICRC Archives, files 240 (20) and 240 (52).

11 Except for military hospital ships flying the flag of a neutral state.

12 Article 31 of the Second Convention.

13 Article 34.


16 Bulletin international, no. 190, April 1917, p. 145.


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20 This opinion is also expressed in the Commentary, vol. II, p. 186.


22 Ibid., pp. 90–1; RICR, no. 226, October 1937, pp. 929–30.

23 Annual Report 1982, p. 30; ICRC Archives, files 240 (20) and 240 (52).


References


CHAPTER II

TRACING WOUNDED, SICK, SHIPWRECKED AND MISSING MILITARY PERSONNEL IN WAR AT SEA

The provisions for recording and forwarding information on the identity of shipwrecked, wounded, sick or dead members of armed forces engaged in war at sea are closely aligned to the corresponding provisions applicable to war on land. So are the prescriptions regarding the dead, which stipulate that before burial at sea the parties to a conflict must take all reasonable precautions to confirm death and establish the dead person’s identity. In fact, Articles 19 and 20 of the Second Convention are almost a repetition of Articles 16 and 17 of the First Convention.

Under either Convention, the action to be taken by the ICRC and the Central Tracing Agency respectively is identical, namely to forward a list of names of wounded, sick, shipwrecked and dead military personnel, as well as any objects of value found on the dead, to forward details of burials at sea, to record the aforesaid information, to enquire into the fate and whereabouts of missing persons, and so on. As these tasks were described in the chapter on activities to trace wounded, sick and missing military personnel in war on land, there is no need to go into them again here (see Part III, Chapter II, above, pp. 498–507).

References

CHAPTER III

RELIEF OPERATIONS FOR WOUNDED, SICK AND SHIPWRECKED MILITARY PERSONNEL IN WAR AT SEA

In war at sea as in war on land, the responsibility for collecting wounded, sick and shipwrecked military personnel and giving them the care required by their condition rests primarily with the armed forces’ medical services and, in an auxiliary capacity, with the National Red Cross and Red Crescent Societies of the belligerent states. It is first and foremost these medical services and National Societies that are covered by the immunities laid down by the Second Geneva Convention of 12 August 1949.

But in war at sea, too, the belligerents’ resources may prove inadequate. Neutral assistance will then be needed in the form of medical supplies and medical personnel; the rules governing such assistance are identical to those previously described.¹

However, the most decisive way for neutrals to help wounded, sick and shipwrecked members of naval forces is by providing hospital ships. Military hospital ships of neutral states are protected by the Second Convention, on condition that their names and descriptions have been notified to the parties to the conflict in accordance with its Article 22.

Conversely, hospital ships used by relief societies of neutral countries do not appear to be so protected unless they are placed under the control of one of the parties to the conflict. Article 25 stipulates that:

Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own governments and with the authorization of the Party to the conflict concerned, in so far as the provisions of Article 22 concerning notification have been complied with.

Although this condition may appear unduly burdensome, considering that it applies to relief societies of neutral countries wishing to assist victims of naval warfare, it is not unreasonable, for only the commanders of the opposing fleets can assess where a battle might take place, and will order the movements of the hospital ships under their command accordingly. A hospital ship sailing independently might hamper the belligerents’ movements, and is
unlikely to be in the right place at the right time. So although the ICRC has
co-ordinated international voluntary assistance in war on land, there can be
no question of requesting it to do so in war at sea.

The Second Geneva Convention does not expressly provide for the ICRC
to charter a hospital ship to assist wounded, sick and shipwrecked members
of naval forces. Protocol I does, however, allow for that eventuality: Article
22, paragraph 2 extends the protection of the Conventions to hospital ships
made available by an impartial international humanitarian organization. The
ICRC is therefore unquestionably entitled to charter hospital ships, but for
these to qualify for the protection of the Conventions it too would have to
place them at the disposal of the warring parties.

Thus ICRC assistance to wounded, sick and shipwrecked members of
naval forces is strictly limited to relief supplies and medical personnel, and to
hospital ships which must be placed under the control of one of the parties to
the conflict. In practice there is clearly little that it can do, and I know of no
case in which it has provided such assistance.

This does not mean that there is no way in which the ICRC can act. On the
contrary, it may decide to transport relief supplies by sea to victims of hostili-
ties on land, for example in coastal towns, by using either cargo vessels to
take in medical supplies, or hospital ships to evacuate or provide treatment
for the wounded and sick.

Ordinary cargo vessels cannot be classed as hospital ships even if they are
used to transport medical aid, and therefore do not qualify for protection as
such under the Second Geneva Convention.

Yet the sea does not belong to the belligerents. Neutral vessels are entitled
to sail the seas unmolested, provided they do not render assistance of a
hostile nature and submit to supervision in accordance with the law of war at
sea, which authorizes belligerent warships to search and control merchant
vessels flying a neutral flag. A merchant vessel chartered by the ICRC to
transport relief supplies and flying a neutral flag is therefore entitled to the
general protection due to neutral ships. It is in addition entitled to the protec-
tion of the red cross emblem, which Article 44 paragraph 3, of the First
Convention authorizes the ICRC to use at all times.2

Vessels charged with philanthropic missions are also protected by Article 4
of the XIth Hague Convention of 18 October 1907, which may be regarded
as a restatement of customary law.3

Lastly, vessels chartered to transport equipment exclusively intended for
the treatment of wounded and sick members of armed forces or for the pre-
vention of disease are protected by Article 38 of the Second Geneva
Convention of 12 August 1949, ‘provided that the particulars regarding their
voyage have been notified to the adverse Power and approved by the latter’.4

The ICRC is therefore fully entitled to charter merchant vessels to trans-
port relief supplies for the care of the wounded and sick. These vessels are
protected by international law and the belligerents are under an obligation to
respect them;5 however, before they may be used to bring relief supplies to a
besieged area there must be an understanding to that effect between the ICRC and the belligerents. Article 18, paragraph 2 of the Second Convention makes this perfectly clear.

ICRC practice confirms these conclusions. The ICRC chartered several neutral cargo vessels, usually of relatively low tonnage, to take relief supplies to Lebanon. They flew their national flag and displayed the red cross emblem; when they were en route to a besieged area the belligerents’ prior consent was always required.6

Whether the ICRC is also entitled to use hospital ships to assist victims of war on land obviously depends on whether those ships will be duly protected. The Second Geneva Convention, which above all regulates relations between belligerents, is anything but clear on this point. It neither explicitly authorizes the ICRC to charter a hospital ship, nor bars it from doing so. Moreover, like Protocol I it appears to require that to qualify for protection under the Conventions, hospital ships chartered by relief societies of neutral countries or by an impartial international humanitarian organization must be placed under the control of one of the parties to the conflict. That condition is readily understandable, as explained above, when the objective is to assist victims of engagements between naval forces, but is not justified in any way for hospital ships used to assist victims of fighting on land. While the purpose of the Convention is ‘the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea’, it is certainly not intended to prevent the use of hospital ships for other purposes compatible with humanitarian law. It is not clear, however, whether the Convention can then be invoked to ensure the protection of those ships.

That it can is a reasonable proposition. In any case, there is no doubt that hospital ships chartered or used by a humanitarian institution such as the ICRC are entitled to protection above all because they are neutral and engaged in a humanitarian operation. Protection is also conferred by the red cross emblem which the Geneva Conventions authorize the ICRC to use at all times, and by Article 4 of the Xith Hague Convention of 18 October 1907, which forbids the capture of vessels charged with religious, scientific or philanthropic missions.

It can therefore be concluded that the ICRC has the right to use hospital ships, sailing under its responsibility and using its emblem, to assist the victims of land battles; the belligerents are bound to respect such ships, whether or not a special agreement has been concluded to that effect, because they are neutral and engaged on a mission of mercy.

Nevertheless these ships may not be used to evacuate wounded and sick from a besieged area unless the belligerents so agree. This is clear from Article 18, paragraph 2, of the Second Geneva Convention:

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.
Hospital ships engaged in an evacuation are therefore immune by virtue of the above principles and the belligerents’ consent to that evacuation. To my knowledge the ICRC has used hospital ships on two occasions to evacuate victims of land warfare.

The first was in late summer 1982 when the hospital ship Flora, chartered by the German Red Cross and placed at the ICRC’s disposal, was used to evacuate wounded Palestinian combatants from Israeli-besieged West Beirut. In all, 238 patients were evacuated on board the Flora to Larnaca and Athens in two voyages, on 26 August and 6 September respectively. Many of them had very serious injuries and required medical attention during the crossing.7

The second occasion was on 17 December 1983, when the ICRC evacuated 94 Palestinian wounded from Tripoli (Lebanon) to Larnaca on board the Appia, chartered by the Italian government and converted into a hospital ship for the operation.8

Both operations were carried out by the ICRC with the prior consent of all the warring parties concerned. The ICRC put delegates and medical personnel on board both ships, which flew a neutral flag and also displayed the red cross emblem.

Notes
1 See Part III, Chapter III, above, pp. 508–24.
2 Although Article 44, paragraph 3, is part of the First Geneva Convention, it authorizes the ICRC to use the red cross emblem to indicate its activities in implementing any of the Conventions. This is perfectly clear from the text of the article and the preparatory work (see Final Record of the Diplomatic Conference of Geneva of 1949, 4 volumes, Federal Political Department, Berne, 1949, vol. II-A, pp. 136–7 and 198). Article 44 of the Second Convention leads to the same conclusions.
4 For the interpretation of Article 38 of the Second Convention, see Part III, Chapter III, above, pp. 513–14. This provision primarily protects vessels belonging to belligerents and engaged in a relief operation. It applies a fortiori to vessels chartered by the ICRC.
5 That obligation does not affect the right of the belligerents’ warships to search and control merchant vessels chartered by the ICRC, in accordance with the supervisory measures laid down by international law and within the limits prescribed by that law.
6 For example, between August and December 1976 the freighter Kalliope made thirteen voyages under ICRC charter between Cyprus and the ports of Tripoli, Jounieh, Tyre and Beirut in Lebanon, carrying in all 3988 tonnes of relief supplies. Annual Report 1976, p. 9.
References

I do not know of any reference works on relief operations in war at sea.
PART FIVE

THE PROTECTION OF PRISONERS OF WAR AND CIVILIAN DETAINNEES

Ah me unhappy!
Who have no home on the earth
or in the shades,
no home with the living or
with the dead.
Sophocles, *Antigone*,
verses 850–2.
INTRODUCTION

The purpose of war being to destroy the enemy state, its defenders may rightfully be killed so long as they are carrying arms; but as soon as they lay them down and surrender, ceasing to be enemies or agents of the enemy, they become simply men again, and there is no longer any right over their lives.


The fate of prisoners of war has never been enviable. They were held responsible for the suffering of the civilian population, and punished for having served an unjust cause. They had been defeated. Therefore they were guilty and, whether few or many, could be put to death. History indeed records countless occasions on which they were massacred, often after atrocious cruelties one shudders to mention. If they escaped massacre it was usually at the cost of their status as free men. Prisoners were part of the spoils of war, like property and cattle. When their captor sold them as slaves he was merely recovering the expenses of fielding an army. The only chance captives had of recovering their freedom and dignity was the highly uncertain prospect of a stalemate between equally matched armies leading to a negotiated peace; but if their city was defeated their fate was sealed. They could hardly hope for clemency. True, the chroniclers report some examples of magnanimous treatment of prisoners. One instance – largely a calculated political move – was Philip II of Macedon’s prompt release of the Athenians captured at Chaeronea (2 August, 338 BC) without ransom and even before the conclusion of a peace treaty. But the chroniclers have invariably remarked that such generosity was in stark contrast to the customs of the time.

Only the practice of ransom, by which a prisoner bought his freedom for money, could confer any value at all on the life of a captured enemy, though only a cash value, for it then became more profitable to set a captive free than to enslave or kill him. The appalling cruelties of antiquity gradually gave way to this sordidly mercantile practice, and were in fact abolished largely because of it. Its widespread acceptance in the Middle Ages and until the dawn of modern times then gave rise to the first tentative formulation of prisoner-of-war status. Yet whereas the treatment reserved for kings and nobles
is fairly well documented, there are few accounts of how commoners fared. History rarely tells us whether they were set free on the spot as not worth keeping captive, or put to death because they could not pay.

In Europe at least, attitudes towards captive combatants did not change until the mid-seventeenth century. With the advent of absolute monarchy and regular armies there, it was no longer considered a disgrace or punishment to be held in captivity as a prisoner of war, but only a safety precaution to prevent a captured enemy from taking up arms again. The prisoner-of-war status later codified by the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 and 1949 is based on this perception of captivity.

The fate of civilian captives was hardly more enviable, whether they were inhabitants of captured cities, peasants caught in the fields or the numerous non-combatant camp followers – servants, grooms, women and children – of armies in the field. They were generally not butchered but sold on the slave market. As the Athenian historian Xenophon laconically observes, ‘It is a universal and eternal law that in a city captured by enemies in a state of war, everyone and everything belongs to the victors’ (Cyropaedia, VII, 5, 73). In principle, slavery in relations between Christian nations did not survive antiquity, but civilian prisoners were no better off for the change. Military and civilian prisoners were massacred on innumerable occasions in the wars of religion and the Thirty Years’ War, as Jacques Callot’s terrifying engravings testify. Here again the rise of absolute monarchy rid Europe of the scourge of private wars, checked violence and led to recognition of the fundamental principle that the civilian population was not to be harmed. Royal armies were immediately recognizable by their brightly coloured uniforms. Royal army fought royal army, but peaceful populations taking no part in the war were to be spared and protected. This principle gained ground in doctrine and international practice from the mid-seventeenth century onwards and was ultimately enshrined in the Hague Conventions of 1899 and 1907. It nevertheless remained permissible for an army in enemy territory to seize hostages to ensure the submission of the local population and take any precautionary measures it saw fit against civilians taking part in or suspected of preparing hostile operations. Similarly, whereas it was customary in the eighteenth and nineteenth centuries to allow enemy nationals who happened to be in the territory of a belligerent state at the outbreak of war, such as merchants, tutors, domestic servants or travellers, a certain time to leave the country, in the twentieth century they were generally interned. The resulting abuses, particularly during the Second World War, are well known. The Fourth Geneva Convention of 12 August 1949 which protects civilians in enemy hands, especially detainees and internees, was adopted to prevent their recurrence.

The Red Cross was founded to help wounded soldiers on the battlefield. Surely then, it was destined to help prisoners of war as well. As early as the Franco-Prussian War of 1870, the International Committee had made the
first moves to this effect through the Basel Agency. However, it was not until the Ninth International Conference of the Red Cross, meeting in Washington in 1912, that such activities were formally endorsed: Resolution no. VI of the Conference proclaimed that the Red Cross had not only the right, but also the responsibility, to help prisoners of war and made the International Committee the linchpin of all Red Cross activities on their behalf.

But could the Red Cross assist captured members of armed forces and refuse to assist civilian prisoners? Again, the reply was self-evident. Long before the matter was considered in terms of policy, it had already been settled in practice, for the International Committee had opened the Civilian Section of the International Prisoners of War Agency in October 1914 on its own initiative, although there were no treaty provisions authorizing it to do so.

Thus the ICRC’s multiple activities to protect and assist prisoners of war and civilian detainees came into being. Their objective is to protect people in captivity against the consequences of war; to identify prisoners and forward family news; to visit places of detention; to carry out relief operations; and to secure the release and repatriation of prisoners. These will be the subjects of the next five chapters.

Purists may object to dealing with aid to prisoners of war together with aid to civilian detainees. There are in theory grounds for this objection, for the protection of civilian detainees is undeniably part of the general protection of the civilian population and is not based on the provisions protecting prisoners of war.

Nevertheless, to include the protection of civilian detainees in the chapters on the protection of the civilian population would have meant much repetition or a host of cross references. I have therefore preferred not to do so. Besides, my intention is not to consider the set of legal rules applicable to this or that category of war victims, but to state what the ICRC may be called upon to do to protect them. Two activities are not necessarily different because they are based on two different Conventions; they may just as well be identical, especially where the two Conventions are related in content. This is not surprising: after all, ICRC activities are shaped not so much by the legal basis for them as by the needs of victims, and the needs of civilian captives are much more similar to those of prisoners of war than to those of civilians at liberty.

Therefore, for clarity’s sake and the better to convey the intrinsic unity of purpose of its activities, I shall deal with the work of the ICRC for prisoners of war together with its work for civilian detainees, pointing out minor variations due to differences in the sets of legal rules applicable. The provisions of the Third Geneva Convention relating to prisoners of war and of the Fourth Convention relating to civilian internees resemble each other sufficiently to justify this approach.
CHAPTER I

THE PROTECTION OF PRISONERS OF WAR AND CIVILIAN DETAINNEES AGAINST THE EFFECTS OF HOSTILITIES

The Prophet said:
The captive is your brother. It is by the grace of Allah that he is in your hands and working for you. Since he is at your mercy, ensure that he is fed and clothed as well as you are. Do not demand from him work beyond his strength. Help him instead to accomplish his tasks.
Muhammad, Hadith.

An enemy who surrenders must be spared. Once he has laid down his arms no one has any right to take his life. He must also be protected against the dangers of battle by being evacuated to the rear as soon as circumstances allow, and until then must not be unnecessarily exposed to danger. Article 19 of the Third Convention states this as follows:

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

Until the early twentieth century a distance of twenty miles from the front was sufficient for prisoners of war to be out of danger, but not in the Second World War, in which thousands of prisoners were killed or wounded during air raids by their own or allied air forces. Understandably, therefore, the Diplomatic Conference of 1949 sought to protect prisoners of war against the dangers of war. Article 23 of the Third Convention stipulates that:

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.
Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

Similar principles apply to civilians of enemy nationality. The detaining power may not in any circumstances use them as a shield against enemy military operations. Article 28 of the Fourth Convention states: ‘The presence of a protected person may not be used to render certain points or areas immune from military operations.’

Camps for civilian internees must be indicated in the same way as prisoner-of-war camps:

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

With reference to non-international armed conflicts, Article 3 of the 1949 Conventions stipulates that

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely ....

It is therefore forbidden to expose such persons deliberately to fighting, whether to shield certain objectives from military operations or for any other reason. Furthermore, Article 5 of Protocol II states that

places of internment and detention shall not be located close to the combat zone [and that persons deprived of their liberty] shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety.
In every new conflict the ICRC has drawn attention to the fundamental obligation to respect and protect any person falling into enemy hands.

- Thus in an appeal on 12 March 1948 concerning the Palestine conflict, the ICRC demanded ‘safety for all who take no part in the fighting’ and stressed ‘the right of every combatant who falls into the hands of the adverse party to be treated as a prisoner of war’.3
- On 26 June 1950 the ICRC likewise drew the attention of all parties to the Korean War to Article 3, which is based on the same principles.4
- Then on 31 October 1956, in a broadcast appeal relating to the events in Hungary, the ICRC stressed that:

> All those who take no part in the fighting must be respected. The taking of hostages … is forbidden. It is prohibited to kill or to wound an enemy who gives himself up. Prisoners must be treated humanely. In no case can any sentence be passed on them without previous judgment pronounced by a regularly constituted court.5

- Similarly, in a message broadcast on 2 November 1956 concerning the Suez conflict, the ICRC repeated that: ‘Every enemy soldier, non-commissioned officer or officer surrendering, or otherwise captured, must be treated as a prisoner of war’.6
- On 11 June 1965, in an appeal relating to the Vietnam War, the ICRC urged that ‘the life of any combatant taken prisoner wearing uniform or bearing an emblem clearly indicating his membership of the armed forces shall be spared, he shall be treated humanely as a prisoner of war’.7

There is no need to cite further examples, for this is the regular practice of the ICRC. Whenever a conflict has broken out the ICRC has reminded all concerned that an enemy who surrenders must be spared and that any prisoners must be humanely treated. In that respect there is no possible distinction between international and internal armed conflicts.

Nor has the ICRC ever failed to intervene when it learned that these principles were being violated. The overwhelming majority of its representations have been confidential, made with its customary discretion, but in some cases it has gone public. For instance, in the Iran-Iraq war it denounced the summary execution of captured enemy soldiers as grave violations of humanitarian rules, committed by both sides.8

The safety of prisoners of war and civilian internees depends largely on where their camps are situated. A nearby airfield, railway junction, armaments factory or other likely target increases the danger to them. The ICRC accordingly instructed its delegates to check on this when visiting places of detention and to notify the relevant authorities whenever prisoner-of-war camps were near major military objectives.9 The delegates also made a point of investigating whether the prisoners had air-raid shelters and fire-fighting equipment, and really could go to their shelters if the alarm was given.10
Article 23 of the Third Convention and Article 83 of the Fourth Convention require the detaining power to give the enemy authorities, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner-of-war camps. The lack of a Protecting Power does not invalidate this obligation, which is imposed to ensure the prisoners’ safety, and the detaining power will then have to find another intermediary. The best qualified and most readily trusted will generally be the ICRC. For example, in the Korean War it was requested to pass on to the government of the Democratic Republic of Korea the information supplied by the UN Unified Command on the location of prisoner-of-war camps controlled by the United Nations forces.

Finally, the combat situation may be such that the detaining power can neither ensure the safety of prisoners of war in its hands nor evacuate them. This is particularly likely when prisoners are taken by resistance movements engaged in guerrilla warfare.

Both in international conflicts and in wars of national liberation as defined by Article 1, paragraph 4, of Protocol I, the detaining power must release prisoners that it cannot evacuate from the combat zone. That obligation is laid down in Article 41, paragraph 3, of Protocol I:

> When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

This provision, which is concerned primarily with prisoners of war, applies *a fortiori* to civilians captured in similar circumstances. The practice it reflects is very long-standing and can therefore be considered applicable to all international armed conflicts, even when the belligerents are not bound by Protocol I.

In internal conflicts, it is not certain that the detaining authority is under any obligation to free prisoners it cannot evacuate. It can, however, do so – and indeed often has done so – at its own discretion. The ICRC’s good offices have thus been requested at various times to facilitate the release of military and civilian prisoners captured by insurgent groups and resistance or liberation movements. In the Algerian war, for example, the ICRC took part in the following operations:

- release of four French soldiers in Tunis on 20 October 1958;
- release of eight French soldiers in Rabat on 3 December 1958;
- release of six French soldiers at Oujda on 20 February 1959;
- release of fifteen French prisoners (nine soldiers and six civilians) and one Swiss national in Kabylia on 15 and 18 May 1959;
- release of three French civilians and one French soldier in June 1959;
Apart from an exchange or unilateral release, which in such a situation depends on the goodwill of the detaining authority, the safety of prisoners can be ensured only by arranging for them to be interned in a neutral country under the terms of Article 111 of the Third Convention:

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

This solution has been proposed by the ICRC on several occasions, but as far as I know it has only once been accepted: under agreements with the Soviet Union, Switzerland, Pakistan and the Afghan resistance movements, three Soviet soldiers captured by Afghan resistance fighters were handed over to the ICRC and transferred on 28 May 1982 to Switzerland for internment under the responsibility of the Swiss authorities. Eight more Soviet prisoners were later transferred to Switzerland in similar circumstances for internment under the same agreements.\(^ {19} \)

Except for frequent delays in the evacuation of prisoners, the implementation of Articles 23 of the Third Geneva Convention and 28 of the Fourth, has given rise to no major difficulties since their adoption. As a rule, the belligerents have not deliberately used prisoners of war or civilian captives to hamper enemy military operations.

The Iraqi government is the only one to have used prisoners of war and civilian internees as human shields, a method of warfare justifiably condemned by the international community. In response to the economic sanctions imposed by the United Nations Security Council following the occupation of Kuwait, and to the deployment of the armed forces of the United States and its allies in Saudi Arabia, the Iraqi government not only forcibly prevented thousands of foreigners in Iraq and Kuwait from leaving, it announced that they would be interned at strategic sites in order to prevent attacks. Although Baghdad defined these internees as ‘guests’ being held to preserve peace, most other states denounced the decision as a form of hostage-taking. In the terms of Resolution 664, adopted on 18 August 1990, the Security Council ordered the unconditional release of all foreign nationals being held against their will. Despite any uncertainty about their status in international law, since Iraq and their countries of origin were not yet at war, their internment on strategic sites unquestionably constituted a first step towards violation of Article 28 of the Fourth Geneva Convention. Apart from one British subject, all these foreigners were released during the final months of 1990.\(^ {20} \)

When the crisis sparked by the occupation of Kuwait flared on 17 January 1991 into armed conflict between Iraq and a coalition of states led by the United States, the United Kingdom, France, Saudi Arabia and Kuwait, the Iraqi government adopted the same attitude as during the hostage crisis, and announced that the prisoners of war captured by its forces would be held at
strategic sites.\textsuperscript{21} Although this threat was apparently never followed through,\textsuperscript{22} it was nevertheless indicative of a clear intention to disregard the provisions of Article 23 of the Third Geneva Convention and to use the prisoners of war to hamper enemy military operations.

The ICRC handled the human shields issue within the framework of a comprehensive approach to the human suffering resulting from the occupation of Kuwait and the subsequent events. In spite of the pressure exerted by public opinion and Western governments, the ICRC was determined to show that it gave priority to no category of victims and was as concerned about the plight of the Iraqi population affected by the sanctions and of the occupied Kuwaiti population as it was about that of the Western hostages.

The ICRC nevertheless made it clear that placing captives at or near strategic sites was contrary to international humanitarian law. It offered its delegates’ services to visit all detained foreigners to whom the consular services of their country of origin were not available. It also offered its services to facilitate the exchange of correspondence between the detained foreigners and their governments and the members of their families outside Iraq and Kuwait. Last but not least, it offered to facilitate the departure of all those authorized to leave Iraq and Kuwait.\textsuperscript{23}

Those offers were not accepted. Baghdad rejected the ICRC’s comprehensive approach, which included activities in aid of the population of occupied Kuwait. The Iraqi authorities also probably thought that their interests would be better served by negotiating the fate of the detained foreign nationals in bilateral talks with each of the states concerned. Any doubts they might have had on that point were soon dissipated by the number of emissaries who set off for Baghdad. The rest is history.

By the same token, the ICRC informed the Iraqi authorities of its views as soon as Radio Baghdad announced that the prisoners of war captured by Iraq would be placed at strategic sites. In a \textit{note verbale} dated 22 January 1991, the ICRC voiced its acute concern and reiterated the terms of Article 23 of the Third Geneva Convention.\textsuperscript{24} In the end, the threat to transfer the prisoners to strategic sites was apparently never carried out.

Notes

2 Fourth Convention, Article 83.
3 \textit{IRCR}, English supplement, no. 5, May 1948, p. 86.
6 \textit{Annual Report 1956}, p. 25.
10 Ibid., pp. 312–13.
11 The lack of a Protecting Power may not be considered as a case of force majeure making it impossible to forward such information.
13 RICR, no. 479, November 1958, pp. 617–18.
15 RICR, no. 483, March 1959, p. 144.
17 RICR, no. 487, July 1959, p. 342.
21 Keesing’s Record of World Events, January 1991, p. 37937.
23 Minutes of a meeting between Mr Cornelio Sommaruga and Mr Tariq Aziz, 2 September 1990; Note no. 241 from the ICRC delegation in Baghdad + annexes, 12 September 1990, ICRC Archives, file 232 (214-00).
24 Note verbale from the ICRC to the Iraqi Ministry of Foreign Affairs, 22 January 1991, ICRC Archives, file 210 (70).

References

CHAPTER II

FROM REGISTERING PRISONERS OF WAR AND CIVILIAN DETAINEES TO RESTORING FAMILY TIES

Keep the home fires burning,
While your hearts are yearning;
Though your lads are far away
They dream of home.
There’s a silver lining
Through the dark cloud shining;
Turn the dark cloud inside out,
Till the boys come home.
Lena Guilbert Ford,
*Keep the Home Fires Burning*, 1915.

A regimental number is not a piece of information,
but a man.
Frédéric Siordet,
*Inter Arma Caritas*, p. 27.

In the great wars before 1815 prisoners of war were virtually forgotten men. Communications between regions disorganized by war were so difficult that the arrival of a letter several months old was considered as a piece of extraordinary good fortune.

So wrote Prince Anatole Demidoff in a letter read out by Henry Dunant to the Constituent Conference of October 1863. Unless a prisoner of war was an officer fortunate enough to have a well-lined purse, it was practically impossible for him to send a message to his family or his superior officers. Servicemen who did not answer at roll call were officially regarded as missing. There was no way of knowing whether they were alive or dead, wounded or in captivity, and apparently the authorities did not care. Time alone would tell: some would come back, and others would not, when the prisoners were handed back at the end of the war. Until then, there was nothing to be done but to wait and see. It is easy to imagine the families’ distress, for the uncertainty was hardly less cruel than knowing their loved one was dead; and also the anxiety of prisoners sent to far distant lands inhabited by people of strange language and customs – prisoners without news of their families, fearful, not altogether groundlessly, of being ‘forgotten’ when peace was finally restored.

Prisoners of war still have such fears, as ICRC delegates can testify. Once the shock of capture is over, what a prisoner of war wants most of all is to
send a message home, if only to say ‘I’m alive’, which is also an appeal: ‘Don’t forget me!’.

Civilian prisoners, caught unawares in a round-up or brutally snatched from their homes, have no less cause to feel lonely and anxious, and to fear that their identity will be lost amid an anonymous multitude of captives.

For all prisoners, military or civilian, to send or receive a message is more than consolation, it is a light in the darkness, almost a promise that they will come back home.

The first attempt to rescue prisoners of war from the isolation that had always been part of captivity was made during the Crimean War (1854–6). Prince Anatole Demidoff, an attaché at the Russian Embassy in Vienna, opened an information bureau to centralize and exchange lists of prisoners. Pointing out that its work was to the mutual advantage of all the parties concerned, this bureau was able to get detailed lists of Western prisoners in Russia and of Russian prisoners in Great Britain, France and Piedmont. Influential correspondents were appointed to visit prisoner-of-war camps, report on the state of the prisoners, distribute relief supplies to them and enquire into the fate and whereabouts of the missing. The bureau also undertook to forward correspondence, money, and documents concerning the prisoners and their families.²

Since the intended purpose of the Red Cross was to help wounded soldiers, then surely – as Prince Demidoff suggested to the Constituent Conference of October 1863³ – it should also relieve the mental anguish of captivity? Dunant himself supported this argument at the First International Conference of Societies for the Relief of Wounded Soldiers, held in Paris in 1867.⁴

Action prevailed over hesitation. There is no need to recall here the work of the Basel Agency and the immense achievements of the International Prisoners of War Agency in two world wars.⁵ Their efforts paved the way for a whole set of important provisions in the 1949 Conventions, aimed at ending the isolation and anonymity of prisoners of war and civilians in captivity.

These provisions will now be considered. For the sake of clarity a distinction will be made between their institutional requirements and their practical effects, always bearing in mind that while an organ is created to perform a certain function, it will in turn influence the action it performs.

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To rescue military and civilian prisoners from anonymity and oblivion, two things are needed: centralization at national level of information about them, and an organ to transmit that information from one belligerent to the other.

Under Article 122 of the Third Convention each of the parties to a conflict must, as soon as hostilities begin and in all cases of occupation, set up an official information bureau for prisoners of war who are in its power, and
must also ensure that it is provided with the necessary accommodation, equipment and staff to work efficiently. The bureau must be at liberty to employ prisoners of war, provided that the conditions laid down in the Convention and relating to work by prisoners of war are duly observed.

Each of the warring parties must, as soon as possible, give its bureau all requisite information to notify the next of kin without delay. This information must include full particulars of each prisoner’s identity, address and family’s address, state of health and notifications of transfers, releases, repatriations, escapes, admissions to hospital and deaths.

The Convention further stipulates that the bureau must forward such information immediately by the most rapid means to the powers concerned via the Protecting Powers and the Central Prisoners of War Information Agency.6

The bureau is also responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity. It must make any enquiries necessary to obtain the information which is asked for if this is not in its possession. All written communications made by the bureau must be duly authenticated.

It is furthermore responsible for collecting all personal valuables, including sums in currencies other than that of the detaining power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died.7 The bureau must also centralize and forward all information on enemy military personnel killed in action or shipwrecked, and all articles of value found on the dead.8

Articles 136 to 139 of the Fourth Convention require an information bureau concerning civilians to be established in the same way, with particular responsibility for centralizing and transmitting information about any persons protected by the Convention who are kept in custody for more than two weeks, or who are subjected to assigned residence or interned. Its duties are closely aligned to those of the information bureau for prisoners of war, with one important exception: whereas information on prisoners of war is in principle automatically transmitted to the power on which they depend, information on a civilian will not be transmitted to that person’s country of origin or residence if to do so might be detrimental to the person concerned or to his or her relatives. Even in such cases, however, the information may not be withheld from the Central Tracing Agency, which on being notified of the circumstances will take the necessary precautions.9

Clearly, the Geneva Conventions have established a well-organized system for the centralization, at national level, of information on prisoners of war and civilian prisoners. They allow each party to a conflict to set up two separate information bureaux, or, if it so prefers, a single bureau to deal with both categories of prisoners.

However, these provisions would be of little use without an efficient and reliable channel for the transmission of information between belligerent
states. That role is assigned to the Central Prisoners of War Information Agency, instituted by Article 123 of the Third Convention:

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief Societies provided for in Article 125.

As regards civilians, Article 140 of the Fourth Convention stipulates that:

A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

The essence of these two articles lies in their first paragraph. The texts are somewhat unfortunately worded, but the proceedings of the Diplomatic Conference of 1929 clarify their meaning and scope. The International Committee had introduced into the draft Prisoners-of-War Code a provision authorizing it to create in a neutral country a Central Information and Relief Agency to which the belligerents would be required to give their support and all facilities. The United States delegation, speaking on behalf of countries far distant from Geneva, did not dispute the need to create an agency in a neutral country, but requested that other means of creating a Central Agency should not be ruled out where geographical or other practical reasons made it
desirable. The result was Article 79, paragraph 1, of the 1929 Convention, which the 1949 Conference took over unchanged.

This provision is clear enough: it is obligatory to set up a central agency in a neutral country; the International Committee is invited to offer its services, if it sees fit, to create it. The parties to the conflict are therefore under no compulsion to accept the ICRC’s offer, provided they have agreed among themselves to appoint another body to create a central agency in a neutral country. Otherwise they are bound to accept the ICRC’s proposal.

Practice has, however, shown that the American delegation’s scruples were unfounded. I know of only one occasion since the 1929 Conference adopted this provision, and indeed in Red Cross history, when a central agency was set up on other than the ICRC’s initiative. It was the Montevideo Agency, opened under Uruguayan government auspices at the time of the Chaco War. Its activities were, to the best of my knowledge, on a very modest scale indeed.

Nevertheless, the 1949 Conventions did allow the formation of a central agency outside the ICRC. The 1929 and 1949 Conferences appear to have overlooked the possibility that in such a case the ICRC would risk being deprived of the information it needed for its other activities. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–7) took steps to put this right by adopting the following provision (Article 33, paragraph 3, of Protocol I):

Information concerning persons reported missing ... and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

It must be admitted, however, that the possibility of setting up a central agency except on the ICRC’s initiative is little more than theoretical. Although the Conventions authorize belligerents to appoint, by mutual agreement, an intermediary other than the ICRC to set up a central agency in a neutral country, the ICRC’s Central Tracing Agency has outstanding advantages: it has more than a century’s experience, well-tried methods, dedicated expert staff, the appropriate technical equipment, and in the National Red Cross and Red Crescent Societies a world-wide network of first-class correspondents. Besides, the Central Tracing Agency is a permanent body, available immediately and at any time. That being so, there seems no reason why states wishing to apply the Geneva Conventions should reject the cooperation it offers and seek another intermediary.

In these days of computers and world-wide telecommunication networks the geographical reasons put forward by the American delegation at the 1929 Conference no longer apply. Only two eventualities could now justify
creating another central agency from scratch, under auspices other than those of the ICRC: the ICRC’s incapacity to act, or its refusal to provide the services of its own Central Tracing Agency.

The first eventuality is outside the scope of this book. The second raises a question of principle that merits closer consideration, namely the nature of the ICRC’s competence.

The question is whether the ICRC is obliged to offer the Central Tracing Agency’s services in the event of conflict. The rapporteur of Commission II of the 1929 Conference unhesitatingly declared that it had no such obligation; he wrote of Article 79:

this formula leaves the International Committee entirely free to take that initiative or not, just as it leaves the powers concerned free to proceed otherwise if they believe that they have good reason to do so, and provided they agree to do so.15

Over half a century later, the ICRC appears to have lost some of that freedom, for it has offered its Tracing Agency’s services in every armed conflict since 1929. The states that supported its action in the past are entitled to expect the same services in future, if only because the principle of impartiality requires the ICRC to come to the relief of all victims without discrimination, whatever their nationality. That is also the conclusion to be drawn from the new Statutes of the International Red Cross and Red Crescent Movement, approved by the Twenty-fifth International Conference of the Red Cross (Geneva, 1986), Article 5 of which states that the role of the International Committee of the Red Cross is in particular ‘to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions’.16 The Statutes of the International Committee of the Red Cross contain an identical provision.17 Anyway, surely nobody can seriously suppose that the ICRC would, except for good reason, fail to offer the Central Tracing Agency’s services in circumstances covered by the Geneva Conventions.

The Geneva Conventions do not preclude the formation of two separate agencies, one for prisoners of war and the other for civilians, but a single body that would combine the respective functions stated in Article 123 of the Third Convention and Article 140 of the Fourth Convention would obviously be more efficient. This has always been the solution chosen in practice.18

Under the Conventions, national information bureaux and the Central Tracing Agency enjoy free postage for mail, are exempt from import, customs and other dues, and enjoy exemption from telegraphic charges or at least greatly reduced rates.19

War disrupts communications. Any special means of transport organized by the Protecting Powers, the ICRC or any other relief organization approved by the warring parties may therefore be used by the Agency to forward correspondence, lists and reports exchanged with national information bureaux,
correspondence by and for prisoners of war and correspondence by and for civilians protected by the Fourth Convention.\textsuperscript{20}

The parties to a conflict are required to give the Agency all reasonable facilities for its work.\textsuperscript{21} These may include the provision of means of transport or of space on board their own means of transport, respect for the radio channels and frequencies reserved for the ICRC, and facilities to obtain visas for its delegates and couriers.

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The legal status of the Agency has occasionally given rise to questions: is it an independent legal entity, or is it simply a part of the ICRC?

Under the Geneva Conventions the belligerents may agree to create a central information agency on their own initiative, and not under ICRC auspices. Such an agency would exist independently of the ICRC. The situation of the Central Tracing Agency is clear, however: the ICRC appoints the Agency’s director and gives him or her the directives it deems necessary; it budgets for the work of the Agency, which has no separate source of funding; the Agency’s activities are an integral part of ICRC operations; and so on. The Agency is therefore a part of the International Committee, which makes it available to belligerents for the accomplishment of certain tasks. Consequently, the fact that the Agency is the subject of specific provisions in the Geneva Conventions and the Additional Protocols thereto does not make it a legal entity separate from the ICRC.

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Now that the Agency itself has been described, let us consider the tasks assigned to it.

The first is to collect all information on prisoners of war and civilian captives that it is able to obtain through official or private channels.\textsuperscript{22} This information will thus be of two kinds: official information from the public services of a belligerent or a neutral state, and unofficial or private information coming from all other sources.

As a general rule, all official information should reach the Agency via the national information bureaux, which must send it all data enabling it to notify the next of kin without delay. This information must be sent to the Agency immediately, and by the most rapid means. In respect of each prisoner of war it must include, in so far as such information is available to the bureaux, the surname, first names, rank, army, regimental, personal or serial number, the place and full date of birth, an indication of the power on which the prisoner depends (the nation in whose armed forces they were serving before capture), the father’s first name and the mother’s maiden name, the name and address of the person to be informed, and the address to which correspondence for the prisoner may be sent.
The Agency must also be given full information regarding transfers, releases, repatriations, escapes, admissions to hospital and deaths. Information regarding the state of health of prisoners of war who are seriously ill or seriously wounded must be supplied regularly, every week if possible.\textsuperscript{23} It must likewise be given full information of any measure taken with regard to civilians protected by the Fourth Convention who are kept in custody for more than two weeks, or who are subjected to assigned residence or interned. For each protected person, the information must include in particular the surname, first names, place and date of birth, nationality, last residence and distinguishing marks, the father’s first name and the mother’s maiden name, the date, place and nature of the action taken with regard to that person, the address at which correspondence may be sent to him or her and the name and address of the person to be informed.

The Agency must furthermore be given full information about all changes pertaining to these protected persons, such as transfers, releases, repatriations, escapes, admissions to hospital, births and deaths. Information on the state of health of internees who are seriously ill or seriously wounded must be supplied regularly and if possible every week.\textsuperscript{24}

The quantity of information required to identify prisoners of war and civilians in captivity may seem excessive to people with no experience of the work entailed. But it must be remembered that at the end of the Second World War, the Central Agency’s card indexes contained information on nearly 50,000 persons of the name of Meyer, nearly 50,000 persons of the name of Müller (including 5000 Hans Müller), and thousands or tens of thousands of people called Smith, Brown, Martin or Rossi.\textsuperscript{25} Clearly, therefore, accurate and detailed information is essential to avoid cases of mistaken identity and all its disastrous consequences for the prisoners and their families.

Fortunately, no conflict since then has led to the detention of prisoners of war and civilian internees in numbers comparable to those of the Second World War. But the risk of error has been just as great, if only because there have been so many persons bearing the same name, especially among Muslim prisoners. In the 1971 conflict between India and Pakistan, for instance, the Agency received 7700 capture cards from Pakistani prisoners bearing the name of Mohamed Siddiqi, whilst one-third of all Indian capture cards bore the name of Singh.\textsuperscript{26}

National information bureaux are of course required to supply only as much of the information necessary to identify prisoners as the prisoners themselves have given. If a prisoner refuses to reveal his true identity or gives incomplete information, the obligation to transmit the information specified in the Conventions to the Central Agency may never be used as a pretext to justify violence or intimidation in order to obtain that or any other information. The prohibition of physical or mental torture certainly prevails over any other obligation.\textsuperscript{27}

It is thus mandatory, under the Geneva Conventions, for parties to a conflict to transmit to the Central Tracing Agency all data enabling it to iden-
tify captives, to monitor them throughout their captivity, and to inform their families. In principle, all this information has to be sent via the national information bureaux, which are, so to speak, the Central Agency’s natural counterparts. All communications in writing made by these bureaux must be authenticated by a signature or seal.28

But however carefully the information supplied by the information bureaux has been compiled, it will not clear up all cases or enable all missing persons to be found. The Geneva Conventions therefore authorize the Agency to use any other legitimate official or private source of information.29

Apart from the national information bureaux, the prisoners themselves will of course be able to give the most information, provided they can make themselves known to the requisite person.

Shortly after the beginning of the Second World War, the ICRC delegation in Berlin, alarmed by the delay in drawing up the official lists of prisoners, proposed that every prisoner of war should be authorized on arrival at a camp and on each subsequent transfer to send the Central Agency a ‘capture card’ reporting his capture and giving all the information necessary to identify him, together with his and his family’s address.30

This initiative proved invaluable. The ICRC’s facilities for forwarding its mail enabled these cards to circulate much more quickly than those sent by prisoners to their families, many of which failed to reach addressees who had been bombed out, or who had fled before the advancing enemy. Similarly, the capture cards reached the Central Agency long before the official lists, and since they were filled in by the prisoners themselves or under their dictation, the spelling was usually more accurate than in the lists prepared by the detaining authority. Also, the cards could be filed directly into the Agency’s card indexes, where they often ended up alongside – and thus provided an answer to – cards recording tracing requests by the prisoners’ families.31 The ICRC therefore lost no time in asking for this system to be put into general use. Hence Article 70 of the Third Convention:

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

Article 106 of the Fourth Convention lays down identical rules for civilian internees.32

Prisoner-of-war representatives and internee committees will often be able to give the Agency particularly valuable information, and must be granted all facilities for correspondence for that purpose.33

The Agency may also collate information gleaned from family messages forwarded through it. In the Spanish Civil War, for example, all messages to
and from prisoners were specially processed in Geneva: by registering each prisoner’s name and place of detention, valuable information was gathered on missing persons and the prison population. About 90,000 messages were examined for that purpose.\textsuperscript{34}

Besides the information it receives from the official bureaux and the prisoners themselves or their representatives, the Agency may record all information passed on to it by other correspondents such as National Red Cross and Red Crescent Societies, other relief organizations, local institutions, parishes, hospitals or private individuals. In the two world wars, the Agency was able to ascertain the fate and whereabouts of thousands of missing persons by means of information sent to it by private persons.\textsuperscript{35}

Lastly, the Agency may obviously be able to fill in gaps in its information from data collected by ICRC delegates in the course of their work, especially during their visits to places of detention.

Part of the Agency’s work is to centralize certain documents that the detaining power is required to send it, such as a duplicate of any certificate of medical treatment issued to a prisoner of war or civilian internee, a duplicate of the medical certificate that must be issued to all prisoners of war who meet with an accident at work, a duplicate of any statement issued to a prisoner of war in respect of moneys or valuables impounded on capture and not forthcoming on repatriation, and death certificates of all prisoners of war or civilian internees who die in captivity.\textsuperscript{36} The Agency may furthermore be asked to forward documents intended for or made out by prisoners of war and civilian internees, such as powers of attorney and wills.\textsuperscript{37} National information bureaux must send the Central Agency all valuables and documents found on dead combatants or left behind by prisoners of war or civilian internees on their repatriation, release, escape or death.\textsuperscript{38}

The Agency’s primary responsibility is to preserve the information and documents entrusted to it. It is first and foremost a depositary, like a notary responsible for the safe custody of documents or information whose preservation is important. But that responsibility is fulfilled only if the information is so ordered that it can be retrieved and used at a moment’s notice. It must therefore be sorted under appropriate headings and sub-headings and analysed, for although the Agency is probably required to record all the relevant information it receives, it must certainly not regard all information as equally important and credit-worthy. So each item of information must be critically examined, and assessed on its own merits and with reference to its source, using methods that meet the most rigorous standards of research.

Thus the growing volume of information has to be properly filed. This is much more difficult than it may seem, because many persons may have the same name, which may be spelt in several different ways,\textsuperscript{39} even for one and the same person. There may be changes of identity, transcription mistakes, vague or inaccurate information by prisoners of war, and especially by families, and so on.
The Agency is also an intermediary between the belligerents and will send to the captives’ power of origin – or, in the case of prisoners of war, to the power in whose forces they were serving when captured – all the information that it has to communicate.

In principle, information on prisoners of war is sent on automatically, according with Article 123 of the Third Convention:

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend.

Information relating to civilian captives must also be transmitted, except where it could harm the person in custody or his or her family. The opinion of the persons concerned on this point is to be considered as decisive. Article 140 of the Fourth Convention states:

The function of the Agency shall be to collect all information ... which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives.

The Agency will also forward legal documents, especially wills and powers of attorney made out by or intended for prisoners of war and civilian internees.

It may also be requested to forward articles found on dead combatants to the rightful authority or person, such as one half of the double identity disc, last wills or other documents of importance to the next of kin, money and all objects of intrinsic or sentimental value; the same applies for personal valuables, sums in currencies other than that of the detaining power and documents of importance to the next of kin that are left by prisoners of war or civilian internees who have been repatriated or released, or who have escaped or died in captivity.

The Agency is required to keep a duplicate of medical certificates and statements issued to prisoners of war and civilian internees that give particulars of medical treatment they have received. The information in these documents must never be passed on to the captives’ power of origin unless the Agency is satisfied that the confidential character of the medical data will be preserved.

As regards correspondence of prisoners of war and civilian internees, the Geneva Conventions merely state that cards and letters sent by or to prisoners must be conveyed by the most rapid method. The Conventions do not specify by what channel these messages will reach their destination. In the past the belligerents often relied on the help of a neutral state’s postal services, but there is nothing to stop them from enlisting the services of the Central Tracing Agency for that purpose. After the conflict of December 1971 between India and Pakistan, for instance, the Agency forwarded fifteen million family messages to and from prisoners of war.
transported the Agency mail bags free of charge between Bangladesh, India and Pakistan.47

Correspondence, relief consignments and authorized remittances of money addressed to prisoners of war or civilian internees or dispatched by them through the post office, either direct or via a national information bureau and the Central Agency, are exempt from any postal dues, both in the countries of origin and destination and in intermediate countries.48

The Agency does not, however, confine itself to receiving, centralizing and transmitting information communicated to it, but often has to make its own enquiries to find out the information it is asked for. It receives countless requests from authorities, relief societies, prisoners’ families and sometimes the prisoners themselves. Some of these are for news of missing persons, and it is these which normally need the most prolonged and difficult investigation. This has already been discussed above.49

Other requests are for news of prisoners of whom nothing has been heard since their capture was announced, who do not write home, or are wounded or sick. Prisoners in their turn may ask for news of their next of kin, especially those who have been uprooted by the fighting and compelled to join the flood of refugees. Prisoners or their next of kin may apply for various documents, such as duplicate identity cards that will enable captured medical personnel to prove that they belong to the medical services and be treated accordingly, or powers of attorney, contracts, wills, business papers, pay allotments, and so forth.

These requests cover practically every aspect of the lives of prisoners and their families. Each has to be dealt with individually, according to the individual circumstances, but they do have some features in common.

The first step, of course, is to look through the Agency’s card index or archives to see whether they contain the desired information. Despite computerization, this often means long and detailed research, trying to track down any data on file that might match the enquiry, identifying transcription mistakes and assessing information that does not tally or is contradictory, etc.50 It is painstaking work calling for scrupulous care and accuracy, in which the Central Tracing Agency’s astonishing skill in establishing hitherto unsuspected connections has enabled it to clear up some seemingly hopeless cases.51

If the Agency does not have the information required, or if its information is too old or unreliable, it will have to open an enquiry. The process starts when an approach is made to national information bureaux. Article 122, paragraph 7, of the Third Convention states:

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

Article 137 of the Fourth Convention provides that: ‘The Bureaux shall reply to all enquiries which may be received regarding protected persons.’
In theory, therefore, the Agency could confine itself to contacting the national information bureaux and leaving them to track down any information not in their possession. In fact, however, it often has to contact numerous other potential sources as well, such as National Red Cross or Red Crescent Societies, commanders in charge of prisoner-of-war or civilian internee camps, prison governors or hospital directors, town halls and municipalities, prisoners’ representatives or internee committees, fellow soldiers and fellow prisoners, and innumerable governmental or local authorities. In countries where there is an ICRC delegation the Agency can naturally rely on the services of its parent institution, the ICRC. In some cases it sets up its own tracing offices in the belligerent countries.

Many of these enquiries take a long time, always longer than expected, and call for infinite patience. Agency officials must be extremely circumspect, lest they arouse suspicion or endanger protected persons or their families; conscientious, for exact, reliable data comes only from scientifically meticulous research; and as ingenious as Sherlock Holmes himself. The Agency’s principles do not vary – they are the standard principles of the entire Red Cross – but no two situations, no two personal tragedies that the Agency has to deal with are alike. Each has to be handled differently. If there ever was a job calling for initiative and resourcefulness, this is it!

Rather than attempt to give a general account of activities that defy categorization, I would ask the reader’s indulgence if for once I relate how a case I witnessed was resolved.

The tracing request came from a Palestinian detainee interned in Kfar Yona prison in Israel. Selim left the West Bank long before the Israeli occupation, spent some years in the Federal Republic of Germany, and married a young German woman there with whom he had a son. In 1970 he came to visit his parents and was arrested on leaving the plane. He then spent more than a year in prison without a single visit from his parents, who were angry with him for going abroad without their permission. He had sent several messages to his wife but had no reply. The poor man was desperate and felt abandoned by everybody.

An enquiry was sent to the German Red Cross, enclosing a note supplied by the prisoner, Selim, and giving his wife’s name and address. It did not help. She still could not be found, and even the village in which she was said to live could not be identified. Exhaustive enquiries undertaken by the Ministry of the Interior and the postal authorities gave no clue to her whereabouts.

The ICRC delegate started again from scratch. He discovered that Selim was illiterate, a fact he had carefully concealed. The precious note on which all the previous enquiries were based had been returned by the German Red Cross. It was found to have been dictated by the prisoner to a cell-mate, who knew no German and had used English phonetic spelling to write out the name and address Selim had given him. It was not at all certain that Selim
could produce a more reliable version from memory. He remembered his wife’s first name and maiden name, but his memory of place names had faded with time. The less he felt he could rely on his memory the more he pinned his faith to the note bearing his wife’s name and address, which for him became almost a talisman.

The ICRC delegate, relying entirely on Selim’s pronunciation and noting each time he hesitated, made a list of about twenty possible spellings of the very long and complicated name of the village in which Selim’s wife was supposed to live. He then addressed an envelope for each possible variation of the spelling, wrote a letter to Selim’s wife, made twenty or so photocopies of it, one for each envelope, and sent them all off by post.

Ten days later the delegate received a long letter on pink paper, in which Selim’s young wife gave moving expression to her despair since her husband’s departure and said how very happy she was to know he was alive, though sad to hear that he was in prison. She enclosed a long message to her husband together with photographs of herself and their little son. The delegate lost no time in handing these precious papers, as required by the current regulations, to the prison authorities for delivery to Selim.

A few days later the ICRC delegate visited Kfar Yona prison, and on asking to see him again found that, as he had feared, Selim did not know what was in the treasured letter. None of his fellow prisoners understood German, and he had been too reserved or too afraid to ask the prison governor. So it was the delegate who read out the long-awaited message and took down Selim’s reply.

This is a good example of the unforeseeable difficulties that crop up, but it was really a very simple case because Selim’s young wife had never changed her address. The difficulties are a hundred times worse when attempting to trace people uprooted by war and transformed into refugees crowding the roads. For each case submitted to it the Agency then has to make one enquiry after another, perhaps in several different countries, using contradictory scraps of information to follow stage by stage the haphazard route that the fortunes of war have driven these unfortunate people to take. Contact between members of a family scattered to the four winds by war, captivity and mass migration is often only restored when two convergent tracing requests from different members of the family come to be filed together in the Central Tracing Agency’s card index.

This shows how useful it is to have an Agency in a neutral country where all tracing requests can converge, and how essential it is for this Agency to be the only one of its kind.

Not only does war tear people apart, it also shifts borders. As a result many prisoners of war cannot go home after their release because their country no longer exists, is under foreign occupation or is in turmoil for other reasons. They have to find a host country, but if they have no identity papers they cannot comply with the formalities for entry to a country of asylum. Other prisoners sent away to distant lands can only return home via
other countries, but have no identity papers and therefore cannot travel. Can the ICRC come to their aid?

The initiative to help former prisoners of war who had been deprived of any identity document was first taken by the ICRC at the end of the First World War. The governments of Austria and Hungary, which were not then represented in Vladivostok, asked the ICRC delegation in the Far East to issue identity documents to enable former Austro-Hungarian prisoners of war deported to eastern Siberia to embark for Europe.54

This situation might still have been thought exceptional at the end of the First World War, but was no longer so at the end of the Second. There were then millions of displaced persons – prisoners of war, internees, deportees and refugees – and tens of thousands of persons who could not go back to their own country. In February 1945, therefore, the ICRC created the travel document which is still in use today.

The document is intended for displaced persons, stateless persons and refugees who, for lack of proper identity papers, can neither return to their country of origin or usual residence, nor travel to a country of their choice willing to grant them asylum. It is issued on the basis of the applicant’s statements or of such documents as he or she can produce. Unlike an official document issued by a government authority and attesting to the bearer’s identity, it is therefore not an authentic identity document, and the ICRC cannot guarantee that the information shown on it is correct.55

The document is nevertheless extremely useful. It provides the holder with a piece of paper on which the authorities of the host country, and where necessary the countries of departure and transit, can stamp the entry and exit visas without which the country of his or her choice could not be reached.

The ICRC travel document is not governed by any international convention, but was introduced by virtue of the ICRC’s universally recognized right of humanitarian initiative. It is also sanctioned by widespread practice, for it has over the years been stamped by the authorities of eighty-nine states and territories, testifying to their acceptance of it. Since 1945, more than half a million displaced or stateless persons and refugees have been able to travel to the country of their choice thanks to an ICRC travel document.56

The work of the Central Tracing Agency does not cease with the end of hostilities, or even the return of peace. In the course of its various activities the Agency accumulates an enormous mass of information and documents that mostly cannot be found anywhere else. Often former military and civilian prisoners, their dependants or other rightful claimants apply to it for the information and documents they need to obtain an indemnity, a pension or any other form of compensation.

If it has the requested information, the Agency accordingly issues attestations of captivity, illness, injury, admission to hospital, and death. When it is not entitled to issue a particular document, such as a death certificate, it can pass on its information to an authority empowered to do so, for example a registrar of births, marriages and deaths in the country concerned.
This activity is not governed by any special provision of the Geneva Conventions, but is obviously a normal corollary of the tasks they assign to the Central Tracing Agency.

In fact, the Agency is still often asked to give information or issue certificates in connection with the Second World War and subsequent conflicts. Over the years, however, the number of enquiries and requests arising from the First World War has dwindled, and generally speaking they are now only of historical interest.\textsuperscript{57}

To sum up, it is clear that the Geneva Conventions, taking account of the experience acquired in two world wars, have prescribed simple, efficient and practical arrangements to rescue prisoners of war and civilian detainees from the isolation and oblivion that has been the lot of captives since time immemorial. The Central Tracing Agency is a vital part of these arrangements, for it has to collect, centralize, preserve and transmit the information specified by the Conventions.

These arrangements, however, apply \textit{ipso jure} only to international armed conflicts. In spite of the grim record of the Spanish Civil War and the obvious humanitarian value of all means of rescuing prisoners from their isolation and allaying their families’ anguish, Article 3 of the 1949 Conventions does not contain any special provision for identifying captives and passing on family messages in non-international armed conflicts.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law should have filled this gap, but did so only to a very limited extent.

Article 5, paragraph 2, of Protocol II provides that persons deprived of their liberty shall be allowed to send and receive letters and cards, the number of which may be limited by the detaining authority if it deems necessary. The effect of this obligation, however, is greatly restricted by the fact that the persons responsible for the internment or detention of persons deprived of their liberty are required to respect these provisions only ‘within the limits of their capabilities’.

The ICRC had included in draft Protocol II provisions for the registration and transmission of information on the prisoners and the dead, and had offered the co-operation of the Central Tracing Agency in communicating this information to the parties to conflict.\textsuperscript{58} Nobody questioned the humanitarian value of these provisions, but unfortunately they were dropped when Protocol II was submitted to the Plenary Meeting of the Diplomatic Conference.\textsuperscript{59}

Nevertheless it should not be concluded that the belligerents are free to act as they please in this respect, for Article 3 of the 1949 Conventions stipulates that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed \textit{bors de combat} by sickness,
wounds, detention or any other cause, shall in all circumstances be treated
humanely ....

Article 4 of Protocol II confirms this principle no less clearly. Prolonged
refusal to provide near relatives with any information on persons who are
deprived of their liberty or dead, or with any correspondence or communica-
tion between a prisoner and his or her family, is unquestionably a kind of
mental torture and is utterly incompatible with that obligation.

Furthermore, like the United Nations General Assembly the Diplomatic
Conference on the Reaffirmation and Development of International Humanitarian Law unhesitatingly and unreservedly confirmed ‘the right of
families to know the fate of their relatives’. It is beyond all doubt that a
humanitarian principle so fundamental and so clearly reaffirmed as this one
does apply to all armed conflicts, whether international or non-international.

Article 3 of the 1949 Conventions also invites parties to a conflict to bring
into force, by means of special agreements, all or part of the other provisions
of the Geneva Conventions, and authorizes the ICRC to offer its services to
them.

These provisions, and the ICRC’s right of humanitarian initiative, are the
grounds on which it may offer its services and those of the Central Tracing
Agency in internal conflicts so as to facilitate the exchange of family messages
and the transmission of information on persons deprived of their liberty or
dead.

Practice confirms these conclusions. In the civil war in Chad and the
conflicts in Nicaragua and El Salvador the ICRC offered its services and those
of the Central Tracing Agency to facilitate the registration of captives and the
transmission of family messages. With the consent of the detaining author-
ities, ICRC delegates themselves registered prisoners when visiting places of
detention. During these visits they also delivered family messages to prisoners
and collected their messages to their families.

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The provisions of the 1949 Conventions governing tracing activities on
behalf of prisoners of war and civilian detainees are clear and not of a nature
to conflict with military necessity. It might therefore be hoped that they
would be fairly easy to apply. Unfortunately this has not always been the
case.

Although capture cards, lists of prisoners and family messages have indeed
reached their destination much more quickly in many conflicts since 1949
than they did before, mainly because they were sent by air or by telex and
computer, there have been serious difficulties in other conflicts.

Some were due to a lack of qualified personnel and suitable equipment. In
many cases the belligerents did not even have the most elementary form of
the national information bureaux prescribed by the Geneva Conventions, and
could not open one for want of the requisite material and above all human
resources. This was a tremendous handicap, for the national bureaux are the Central Tracing Agency’s natural counterparts. They are also the channels through which the Agency receives the official information the belligerents are required to give it. Without those bureaux the Agency is, so to speak, blind and deaf.

To overcome this difficulty, the Agency had to take over more and more of the work normally assigned to the national information bureaux. With the consent of the competent authorities it set up tracing offices in most of the belligerent countries, and in many cases even assumed the task of registering prisoners of war and civilian internees, and collecting and distributing family messages. By doing so it certainly rescued countless war victims from their isolation and eased their anxiety, and that is the main thing; but it meant that people have tended to confuse the work of the Central Tracing Agency with that of the national information bureaux. This may in the long run have serious disadvantages.

Other difficulties were caused by deliberate disregard for the relevant provisions, as when certain belligerents refused to disclose the number and identity of prisoners captured by their armed forces, and either absolutely prohibited the transmission of family messages or made them subject to political conditions completely alien to the letter and spirit of the Geneva Conventions.

The ICRC’s work was particularly severely impaired in three such cases:

- After sending the ICRC two lists of prisoners in August and September 1950, bearing in all 110 names, the North Korean authorities ceased to give any particulars of the prisoners captured by their armed forces and did not reply to the Agency’s requests. The ICRC was therefore unable to answer the many requests for information that were addressed to it. Conversely, the United Nations Command regularly sent the ICRC full lists and capture cards for its Korean and Chinese prisoners of war.63

- In the Vietnam war the Democratic Republic of Vietnam refused to notify the identity of American and Vietnamese prisoners captured by the North Vietnamese forces or their allies. The authorities in Saigon did send the ICRC lists of prisoners captured by the American or South Vietnamese forces, but they reached the ICRC only after interminable delays and were invariably incomplete. Thus the ICRC never had more than fragmentary information on prisoners held south of the 17th parallel, and no information at all on prisoners held north of that line.64

- In the October 1973 war the Syrian Arab Republic refused to inform the ICRC of the number and identity of the Israeli prisoners captured by its armed forces. It was not until 28 February 1974 that a list of names of these prisoners was sent to the ICRC, more than four months after the cease-fire ordered by the United Nations Security Council.65

These were obviously flagrant breaches of the Conventions. They flouted the ICRC’s prerogatives and prevented it from fulfilling its mandate, and were an
implicit and inexcusable form of blackmail placing the prisoners’ future at stake.

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The sole purpose of all the Central Tracing Agency’s activities for military and civilian prisoners in enemy hands, and for their families, is to alleviate the mental suffering caused by separation and captivity. To a prisoner far from home in hostile surroundings, or a family devastated by the news that father, husband or son has been reported missing in action, a name on a list of prisoners, or a capture card or family message, brings mental solace as great, in its way, as the physical relief a medical officer brings to a wounded man on the battlefield. From this point of view all the Central Tracing Agency’s activities can be regarded as a form of assistance to captives and their families.

But at the same time, all the Agency’s activities are designed to provide protection. First of all, they protect against the loss of identity, the demoralization and insidious lapse into anonymous oblivion that all too often accompany captivity and are the first stages of a dehumanization process to which innumerable victims have borne witness. By giving prisoners back their names and identity as individual human beings, and restoring at least a minimum of communication for them with the outside world and people near and dear to them, the Agency is helping to protect their personality and human dignity.

Its activities are also a form of protection against violence and arbitrary treatment. Registering a captive will not protect him from all the iniquities of a cynical adversary, but a prisoner whose identity is known outside the prison camp is in less danger than one who is not known to exist and who the detaining authority can always claim was killed in action. In this respect, for each prisoner to have a ‘duplicate’ in the Central Tracing Agency’s card indexes, where all his or her movements, transfers and changes of status are recorded, is undoubtedly a valuable insurance policy against arbitrary treatment and the threat of an unmarked grave. It is also a precious guarantee that those prisoners will not be forgotten when the time for repatriation comes. Registration is the first stage of the protection that the ICRC can give captives, for it can only protect people it knows.

This explains why the Geneva Conventions not only stipulate that all prisoners must be enabled to announce that they are still alive by sending their respective family and the Central Tracing Agency a capture card on arrival at a camp and whenever they are transferred elsewhere, but also require the detaining power to inform the power on which the prisoners depend of their name and other particulars establishing their identity. In giving this information the detaining authority recognizes to some extent its responsibility towards its captured enemies.

Experience shows that the prisoners themselves are fully aware of the protection they derive from being registered by an external neutral witness. This
is clear from the Agency’s archives. They contain humble evidence of the wealth of ingenuity expended by captives to make themselves known, such as the empty cigarette packet bearing the names and home addresses of Italian prisoners who, at an obscure station, pushed it through a chink in the railway wagon that was carrying them away into the unknown.70

Protection and assistance; these two facets of ICRC action are intimately associated in the Central Tracing Agency’s activities. They are more tightly intertwined than the tendrils of the vine, for they are not two separate activities that can be combined and separated at will, but a single activity with a dual aim. Registration, capture cards, and family messages bringing long-awaited consolation to next of kin are also a form of protection, for they are proof that the individuals concerned are prisoners in the hands of an enemy which may therefore be held accountable for them. There is perhaps no other activity that so clearly demonstrates the fundamental unity of humanitarian work, and the utter futility of attempts to divide ICRC activities into two separate categories.

Notes

1 Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne, Imprimerie Fick, Geneva, 1863 (hereinafter Compte rendu ... 1863), p. 28. Indeed, the first attempts at systematic organization of the registration of prisoners of war and transmission of their correspondence date only from the latter half of the nineteenth century.


3 Compte rendu ... 1863, pp. 27–9.


5 For further details see the references at the end of this chapter, and Gradimir Djurovic, The Central Tracing Agency of the International Committee of the Red Cross, Henry Dunant Institute, Geneva, 1986, especially pp. 9–27, 39–76 and 103–90; also above, pp. 33–5, 84–90 and 177–9.

6 See Book II, Part 7, Chapter II of this work (page 861) for the reasons why information on prisoners of war and civilian internees must be transmitted through two intermediaries instead of a single intermediary.

7 Convention III, Article 122.

8 Convention I, Article 16; Convention II, Article 19.


10 The legislative history of Article 123 of the Third Geneva Convention of 1949 is largely the same as that of Article 79 of the Convention relative to the Treatment of Prisoners of War of 27 July 1929, whose essential features it has adopted. The following documents should therefore be consulted: Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre, réunie à Genève du 1er au 27 juillet 1929,
Registering POWs and Restoring Family Ties


12 Article 88 of the preliminary draft of the Prisoners-of-War Code, Actes 1929, p. 32.

13 Procès-verbaux des Sous-Commissions de la Conférence diplomatique de 1929 (typewritten), Deuxième Sous-Commission (administrative et sanitaire) de la Commission II, sessions of 13, 15 and 20 July 1929; Actes 1929, p. 509.


15 Actes 1929, p. 636.


18 Article 140, paragraph 1, of the Fourth Convention explicitly allows the formation of a single agency performing both functions.


20 Third Convention, Article 75; Fourth Convention, Article 111.
21 Third Convention, Article 123, paragraph 2; Fourth Convention, Article 140, paragraph 2.
22 Ibid.
23 Third Convention, Article 122.
24 Fourth Convention, Articles 136 and 138.
27 Third Convention, Articles 17, paragraph 4, and 122, paragraph 4; Fourth Convention, Articles 31 and 32.
28 Third Convention, Article 122, paragraph 8; Fourth Convention, Article 137, paragraph 3.
29 Third Convention, Article 123, paragraph 2; Fourth Convention, Article 140, paragraph 2.
31 Ibid., vol. IV, pp. 446–8.
32 Whereas Article 70 of the Third Convention and Article 106 of the Fourth Convention stipulate that prisoners of war and civilian internees must be enabled to fill in a capture card or internment card immediately after the commencement of their captivity and at each transfer to hospital or another camp, there is no provision requiring them to fill in a similar card when repatriated or released. This omission probably occurred because the ICRC and the Central Agency were largely kept away from repatriation and release operations at the end of the Second World War. It is a regrettable omission, for the Agency is often asked for information about former prisoners who were either not willing or not able to return home after their release.

When repatriating the Pakistani prisoners captured in the conflict of December 1971, the Agency circulated ‘repatriation cards’ on which the prisoners wrote their personal data and the address at which they could be reached in Pakistan, then handed the cards to ICRC delegates on crossing the border into Pakistan. When filed in the Agency’s card indexes, the repatriation cards tallied with the capture cards filled in by those same prisoners at the start of their captivity; the Agency was thus able to reply to many requests for information which it could not otherwise have answered. The repatriation card was an extremely useful idea, and it is to be hoped that it will be generally adopted.

33 Third Convention, Article 81, paragraph 4; Fourth Convention, Article 4, paragraph 3.
35 At the end of the First World War the French section of the Agency possessed approximately 10,000 pages of unofficial information due largely to the selfless efforts of correspondents who searched the Belgian and French battlefields. A single correspondent, the Belgian nurse Elisabeth Barbier of Charleroi, contributed as many as 4900 items of information on German, French, Belgian and British soldiers killed in the fighting of August and September 1914. Rapport général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920, pp. 43 and 51. In the Second World War the Agency also drew very largely on information from unofficial correspondents, particularly when the national information bureaux were prevented from doing their work by military developments. Report of the International Committee of the Red Cross on its Activities during the Second World War, vol. II, pp. 45–6, 129, 133, 134, etc.
36 Third Convention, Articles 30, paragraph 4, 54, paragraph 2, 68, paragraph 2, and 120, paragraph 2; Fourth Convention, Articles 91, paragraph 4, and 129, paragraph 3.
37 Third Convention, Article 77; Fourth Convention, Article 113.
38 First Convention, Article 16, paragraph 3; Second Convention, Article 19, paragraph 3; Third Convention, Article 122, paragraph 9; Fourth Convention, Article 139.
39 For example, the Agency recorded forty-two spellings of the surname Schwartz and thirty-three of the name Weiss, The Central Tracing Agency of the ICRC, p. 15.
40 The transmission of information on prisoners of war became a particularly sensitive issue after the Gulf War (January–February 1991). Many of the Iraqi prisoners of war captured during the conflict were opposed to notification of their names either to their power of origin or to their families, and agreed to reveal their identities only after having been assured that
no information about them would be given to the Iraqi authorities. At a conference organized under ICRC auspices in Riyadh on 7 March 1991, the representatives of Iraq, Saudi Arabia, Kuwait, the United States, the United Kingdom and France agreed that the names of prisoners who did not wish to be repatriated would not be notified to their power of origin or to their families (Memorandum, 5 March 1991, annexed to message no. 326 from the ICRC to the delegation in Riyadh; Memorandum of Understanding, 7 March 1991, annexed to the note of 8 March 1991 from the delegation in Riyadh to the ICRC. ICRC Archives, file 210 (19–70)). However, this interpretation of the provisions of the Third Geneva Convention, while undoubtedly respecting the spirit of the law by taking into account the prisoners’ wishes, makes it impossible to process the files of missing persons. When the detaining power gives answers such as ‘Unknown’ or ‘No information available’, the power of origin of a missing soldier has no means of knowing whether he has disappeared without a trace or is alive and a prisoner but does not want any information forwarded about him.

41 For the reasons leading to the adoption of two different systems, see Final Record 1949, vol. II-A, pp. 406–7.
42 Third Convention, Article 77; Fourth Convention, Article 113.
43 First Convention, Article 16, paragraph 3; Second Convention, Article 19, paragraph 3; Third Convention, Article 122, paragraph 9; Fourth Convention, Article 139.
44 This at least is the conclusion to be drawn from the wording of Articles 30 and 54 of the Third Convention, as opposed to the wording of Article 68 thereof.
45 Third Convention, Article 71, paragraph 1. Article 107 of the Fourth Convention merely states ‘with reasonable despatch’, a lamentably vague expression.
48 Third Convention, Article 74; Fourth Convention, Article 110; Universal Postal Convention, Article 17. Article 63 of the Universal Postal Convention, revised at Rio de Janeiro in 1979, expressly provided that consignments exempt from postal dues, including the correspondence of prisoners of war and civilian internees, national information bureaux and the Central Tracing Agency, should be exempted from transit charges and terminal dues (Acts of the Universal Postal Union, revised at Rio de Janeiro in 1979 and annotated by the International Bureau, vol. 2, Universal Postal Convention, International Bureau of the Universal Postal Union, Berne, 1980, p. 92). In order to simplify statistical operations, this provision was deleted from the Universal Postal Convention revised at Hamburg in 1984 and at Washington in 1989 (Acts of the Universal Postal Union, revised at Hamburg in 1984 and annotated by the International Bureau, vol. 2, Universal Postal Convention, International Bureau of the Universal Postal Union, Berne, 1985, p. 99; Universal Postal Union: Convention, revised by the 1989 Washington Congress and annotated by the International Bureau, vol. 2, Universal Postal Convention, International Bureau of the Universal Postal Union, Berne, 1991, p. 108). When the Universal Postal Convention is next revised the opportunity should be taken of requesting that this exemption be restored so as to avoid any discrepancy between the Universal Postal Convention and the Geneva Conventions, since nearly all states are party to both the Postal and Geneva Conventions.
50 For information on the procedure followed during the Second World War see the Report of the International Committee of the Red Cross on its Activities during the Second World War, vol. II, pp. 39–44.
52 It goes without saying that the Agency must never attempt to obtain information by illegal means. All its activities, including the enquiries described above, must take place in an atmosphere of trust leaving no room for suspicion.
53 In accordance with standard practice, the name given here is fictitious.
54 RICR, no. 17, May 1920, pp. 610–11; no. 36, December 1921, pp. 1210–11; Renée-Marguerite Cramer, ‘Rapatriement des prisonniers de guerre centraux en Russie et en Sibérie

The ICRC takes all possible precautions in the prevailing circumstances to ensure that the information to be entered on its travel documents is accurate, but cannot guarantee its accuracy because large numbers of these documents may have to be issued at very short notice and in circumstances that preclude verification of any kind.

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61 Protocol I, Article 32.

62 There are countless mentions of these operations in the International Review of the Red Cross and in the ICRC’s Annual Report, beginning in 1978 for the Chad conflict, 1979 for the Nicaraguan conflict and 1980 for the conflict in El Salvador.

63 The International Review of the Red Cross contains many references to this problematic situation. See also the Annual Report 1950, pp. 51–2; Annual Report 1951, pp. 55–7; Annual Report 1952, pp. 44 and 56; Annual Report, 1953, p. 53.


66 This attitude is the foundation of all the rules for the Central Tracing Agency’s work for prisoners and their families. It presupposes, however, a psychological and emotional outlook that is not necessarily shared by all countries and civilizations. As mentioned in an earlier chapter, most Japanese prisoners in the Second World War did not want their families to be informed of their captivity and gave false names, convinced that it was better if they were believed dead rather than known to be prisoners, for captivity was regarded as a dishonour worse than death, both for the prisoner and his family (Report of the International Committee of the Red Cross on its Activities during the Second World War, vol. I, pp. 437–9). In some recent conflicts the belligerents have expressed similar views, either refusing to communicate the names of prisoners captured by their own armed forces or returning lists to the Central Tracing Agency of prisoners captured by their enemy, instead of passing on the information. While the weight of tradition and differences of mentality should not be neglected, experience has shown that the gap between official pronouncements and the heart’s desire of prisoners and their families is often much wider than the authorities will admit. The authorities may affirm that families do not care what happens to
sons who have allowed themselves to fall into enemy hands, but those families will often try by the most circuitous means to get the information they are said not to want.

67 The term ‘his duplicate’ is taken from Frédéric Siordet’s Inter Arma Caritas, p. 28. In the original French version the term his ‘double’ was used. No other term so aptly sums up the work of the Central Tracing Agency.

68 Third Convention, Article 122; Fourth Convention Article 137.

69 ‘Through its delegates, the ICRC attempted to obtain nominal rolls of prisoners captured on both sides. These lists as laid down by the Third Convention form the best method of ensuring the safety of prisoners, the detaining Government thus recognising its responsibility towards enemies it has captured’, states the ICRC in an account of its activities in the 1965 conflict between India and Pakistan. IRRC, no. 61, April 1966, p. 193.

70 There is a photograph of this document in Djurovic, The Central Tracing Agency, p. 26.

References


CHAPTER III

VISITS TO PLACES OF DETENTION

I was sick, and ye visited me.
I was in prison and ye came
unto me.
St Matthew, xxv, 36.

1. Introduction

Visits to places of detention are undoubtedly the most important of all the International Committee’s activities, for in this way it establishes direct, personal contact with the captives it is mandated to protect. All its other activities on behalf of detainees depend on this one. It is generally by visiting places of detention that ICRC delegates can complete lists of prisoners and are most likely to pick up the trail of missing persons; and all ICRC relief operations begin by enquiring into captives’ needs and end by monitoring distributions. Only by visiting places of detention can the ICRC get the firsthand information it needs to make suitable representations and inform governments about the living conditions and treatment of their nationals there.1 Visits to places of detention are the cornerstone of the ICRC’s protection of prisoners.

Every one of the ICRC’s Annual Reports mentions the year’s visits to places of detention in various countries, but the Committee has rarely described the procedure of its visits and the conditions that must be met. Does that mean that no comment is necessary, and that the term ‘visits to places of detention’ is self-explanatory? Certainly not. Every delegate who has had the heavy responsibility of presenting the ICRC’s offers of services, or of making the first visit to a place of detention, has seen the detaining authorities’ surprise on hearing how the visits were to be carried out, especially when the delegate asked to be able to speak in private with the prisoners of his or her free choice. The general public is no better informed than governments. As for the captives, they are usually torn between distrust and disbelief when they meet for the first time this foreign visitor, this civilian who seems to have come straight from a world as remote to them as another planet – a world at peace.

The subject of ICRC visits to places of detention therefore deserves thorough consideration. For clarity’s sake I shall deal with it under the following headings:

- the legal basis for visits to places of detention;
- the purpose of visits;
Visits to Places of Detention

- the visiting procedure;
- the preparation of reports on visits;
- the addressees of reports on visits;
- the use of reports on visits;
- the categories of prisoners whom delegates are authorized to meet.

In a concluding section I shall try to show the main developments in ICRC policy and practice on this subject since the Second World War.

The legal basis and operational principles for visits to prisoner-of-war camps are the same as for visits to civilian internee camps. Visits to one or the other follow the same procedure; reports have the same basic structure, and are circulated in accordance with the same principles. Both kinds of camp can therefore be dealt with in a single chapter by taking visits to prisoner-of-war camps as the model and mentioning at the end of each section any specific considerations to be taken into account for civilian internee camps.

2. The legal bases for visits to places of detention

The International Committee’s first visits to prisoner-of-war camps were made in the winter of 1914–15, on its own initiative and after obtaining the consent of the governments concerned. On that basis it continued to make such visits throughout the First World War.²

It had hoped that by acknowledging the ICRC’s right to appoint special missions to visit prisoner-of-war camps, the Diplomatic Conference of 1929 would enshrine that initiative in positive law. That hope was disappointed. Under the terms of Article 86 of the 1929 Geneva Convention on prisoners of war, the Conference recognized the right of representatives of the Protecting Powers to proceed to any place where prisoners of war were interned and to hold conversation with prisoners, as a general rule without witnesses. It did not see any need to add a similar provision in favour of ICRC delegates.³

So the ICRC was again acting on the strength of its right of humanitarian initiative, and subject to the prior consent of the belligerents concerned, when it instructed its delegates to visit prisoner-of-war and civilian internee camps in the Second World War. This did not prevent it from developing such work to an extent hitherto unknown.⁴

Its legal right to do so was, however, uncertain. This was a great disadvantage, if only because the detaining authority could at any moment challenge the facilities granted to the ICRC. The 1949 Diplomatic Conference therefore readily agreed to insert in the Third and Fourth Geneva Conventions provisions bringing the prerogatives of ICRC delegates into line with those of representatives of Protecting Powers. The Conference thereby paid tribute to the ICRC’s exercise of its right of initiative throughout two world wars, and gave it the firm basis for its future efforts that it had hitherto lacked.
Visits to prisoners of war by representatives of the Protecting Powers and by ICRC delegates are regulated as follows by Article 126 of the Third Convention:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of detention, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners’ representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.5

These provisions amplify Article 86 of the 1929 Convention in two essential respects:

a) They bring the competence and prerogatives of ICRC delegates strictly into line with those of representatives of Protecting Powers.

b) They explicitly and unreservedly give representatives of Protecting Powers and ICRC delegates the right to speak with the prisoners in private. The phrase adopted by the 1929 Conference ‘as a general rule without witnesses’, which in the Second World War brought untold suffering to so many prisoners of war, particularly those in Japanese hands, was discarded without discussion.

Article 126 of the Third Convention met with no opposition at the 1949 Diplomatic Conference. It reflects the practice in the Second World War of the Protecting Powers and the International Committee in countries in which the 1929 Convention was applicable. It should therefore also be interpreted in the light of that practice.

Article 143 of the Fourth Convention regulates in identical terms visits to camps and other places of detention in which civilian prisoners are interned.6 Moreover, Article 76 of the Fourth Convention explicitly confers on representatives of the Protecting Powers and ICRC delegates the right to visit civilians who are accused of or have been sentenced for an offence.

These provisions call for little comment,7 but it is worth mentioning three points which make clear the respective obligations of the detaining power and the ICRC. They are as follows:

a) The International Committee must request the detaining power’s approval of the appointment of delegates who are to visit camps for prisoners of
war or civilian internees. This provision is in accordance with international usage and ICRC practice. It allows the detaining power to object to the appointment of a delegate whom it has good reason to reject, but not to refuse systematically delegates nominated by the International Committee, a procedure that would make the above-mentioned articles meaningless and would be a manifest breach of the Geneva Conventions.

b) The Conventions require ICRC delegates, just as they require delegates of the Protecting Powers, to ask permission to visit places of detention; but they also oblige the detaining power to grant that permission. This is clear from Article 126, paragraph 1, of the Third Convention and Article 143 of the Fourth Convention, which state that ‘Representatives or delegates of the Protecting Powers shall have permission ...’.8

c) Lastly, the reservation relating to military necessity is strictly limited. It reads: ‘Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure’. It is for the detaining power to assess the degree of imperative military necessity in the situation of the moment, but if it abuses this reservation it becomes responsible for the consequences, and may be accused of violating the Geneva Conventions by disregarding the restraints they impose. The reservation must be interpreted in the spirit of the rest of the Conventions, especially Article 19 of the Third Convention, which requires the detaining power to evacuate prisoners of war from the combat zone as soon as possible after their capture, and Article 50 thereof, which rules that prisoners of war may not be compelled to do any work of a military character.9

On the basis of Articles 126 of the Third Convention and 143 of the Fourth Convention, the International Committee has established three operational principles which regulate its visits to places of detention and form part of its instructions to its delegates:

a) The ICRC requests that its delegates be permitted to visit all places of detention of prisoners of war or civilian detainees, and to meet all persons held there.

This requirement is essential, for if the ICRC permitted its delegates to visit only certain places of detention chosen by the detaining power, or to meet only some of the inmates, it would get only incomplete information which might mislead it to sanction conditions in others not visited by its delegates, and possibly maltreatment of prisoners its delegates were not allowed to meet.

b) The ICRC requests that its delegates be allowed to interview without witnesses the prisoners of their own free choice.

This requirement is in accordance with regular ICRC practice and with the provisions of the above-mentioned Articles 126 and 143.

c) The ICRC requests that its delegates be allowed to visit places of detention at regular intervals until the prisoners there are finally released.
This requirement is self-evident, for the Geneva Conventions are intended to protect captives throughout their detention, not momentarily, and the only way to give them long-term protection is to make repeated visits. Only visits repeated at reasonably short intervals will enable a relationship of mutual trust to be established with the detaining authorities and the captives. Moreover, without repeated visits there is no certainty that once the delegates have left, retaliatory measures will not be taken against detainees who have complained of their living conditions. A one-off visit would most probably miss essentials.10

These three operational principles are essential conditions without which the International Committee will not allow its delegates to visit places in which prisoners of war and civilian prisoners are detained, other than in very exceptional circumstances.

The ICRC also requests that its delegates be given a list of names of the prisoners they will be visiting, or that they be allowed to compile one during their visit. This request is based on the provisions concerning the Central Tracing Agency, whose activities are described in the previous chapter.

Lastly, the ICRC requests that its delegates be allowed to distribute relief supplies, where necessary, to prisoners and their needy families. This request is based on Articles 72 and 125 of the Third Convention and Articles 59, 62, 76, 108 and 142 of the Fourth Convention. It, too, is self-evident, for the purpose of visits to places of detention is not merely to observe and monitor conditions of detention but also to improve them whenever necessary. Where ICRC delegates find shortcomings that the ICRC itself could remedy by sending relief supplies, it would be absurd for the detaining power to object to such assistance being sent.11

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Articles 126 of the Third Convention and 143 of the Fourth Convention are immediately applicable only to international armed conflicts.

Unless there has been a recognition of belligerency or a special agreement between the parties to conflict on ICRC visits, the only provisions that are immediately applicable to internal conflicts are Article 3 common to all four Geneva Conventions and, in some cases, Protocol II additional thereto.

However, although Article 3 stipulates that ‘members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely’, it does not contain any special provision requiring that ICRC delegates be given access to places where prisoners are held.12

Consequently the belligerents, arguing that there was nothing in the Conventions requiring them to allow delegates of the ICRC or any other impartial humanitarian institution to visit places of detention controlled by them, often forbade any such visits, thus depriving prisoners of much of the protection to which they are entitled under Article 3.
This was unsatisfactory, especially when the captured combatants were carrying arms openly and complied with the other conditions of Article 4, paragraph 2, of the Third Convention. The Twenty-first International Conference of the Red Cross, held in Istanbul in 1969, therefore declared that:

combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war.\textsuperscript{13}

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts should therefore have regulated this matter. It did not do so.

In view of the reservations that transpired at the Conferences of Government Experts meeting in Geneva in 1971 and 1972, the ICRC submitted to the Diplomatic Conference a provision of very limited scope that did not go so far as the opinion expressed by the Red Cross Conference at Istanbul. Article 8, paragraph 5, of draft Protocol II read:

Subject to temporary and exceptional measures, the parties to the conflict shall endeavour to facilitate visits to the persons referred to in paragraph 1 by an impartial humanitarian body such as the International Committee of the Red Cross.\textsuperscript{14}

Although this draft article was little more than a recommendation, it met the same fate as all the provisions for the implementation of Protocol II: the plenary Conference made a clean sweep of them all.\textsuperscript{15}

Failing a recognition of belligerency or a special agreement between the belligerents concerned, the only provision in the Conventions that applies with regard to visits in the case of non-international armed conflicts is still Article 3, paragraph 2, of the 1949 Conventions: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ The ICRC may therefore propose, on the basis of this provision, the competences granted to it by the Statutes of the International Red Cross and Red Crescent Movement, and the fundamental principle of humanity, that its delegates be allowed by the belligerents to visit the prisoners in their hands. The belligerents, however, are under no obligation to accept that proposal, as the ICRC itself agrees:

This obligation by States to grant the ICRC access to prisoners of war and civilian detainees exists, however, only in international conflicts. In civil wars, internal disorders or tensions, such ICRC visits are permitted only as a concession and subject to \textit{ad hoc} agreements with the detaining authority.\textsuperscript{16}

Thus, if there has been no recognition of belligerency or \textit{ad hoc} agreement in a non-international armed conflict, the belligerents are under no obligation to allow ICRC delegates to visit places where captives are held. If they do allow
such visits it will be only as a voluntary concession, reflecting a relationship of mutual trust. The question of the procedure for visits to places of detention in a non-international conflict will then arise.

This matter is not regulated by the Geneva Conventions, so to avoid difficulties during the visits it will be advisable to fix the procedure for them in advance by concluding agreements with the detaining authorities. The ICRC will therefore have to negotiate with each party concerned, in an atmosphere of mutual respect, a procedure acceptable to the belligerents and to itself.

For a long time the ICRC’s attitude in these negotiations reflected an empirical approach: the Committee did what it could to get permission for its delegates to work as freely as possible in the particular circumstances of each case, but did not set minimum conditions in advance for carrying out the visits.

This pragmatic approach had its drawbacks, as it could lead the ICRC to submit in some cases to conditions that it rejected in others. To avoid arbitrary decisions the ICRC therefore found it necessary to lay down guidelines applicable not only to all non-international armed conflicts but also to internal disturbances and tension.

There are few questions that the ICRC has studied as thoroughly. The conclusion was that the only possible operational principles in such circumstances were those derived from the Geneva Conventions:

- Its delegates must have access to all places of detention and be allowed to meet all prisoners therein.
- They must be allowed to converse freely and without witnesses with any prisoners of their choice.
- They must be allowed to make return visits as and when needed to places of detention.\textsuperscript{17}

The ICRC consequently applies those same operational principles to all conflicts and all categories of prisoners.

This is not surprising, for the principles and rules established in response to international armed conflicts are always valuable as examples in internal conflicts, which, as already stated, are still largely regulated on the international plane by provisions transposed from the law of international armed conflicts. Besides, the three principles mentioned above are not arbitrary, but follow from the aims envisaged and the very nature of this activity.

Some observers may object that by invoking the same operational principles in different situations, the ICRC is disregarding the difference between the law applicable to international armed conflicts and the law governing internal conflicts.

This objection is unfounded. Whereas the ICRC does consider that the principles – which derive from the Geneva Conventions – apply fully to international armed conflicts, in non-international armed conflicts they serve as a
basis for negotiated agreements with the warring parties, and therefore rank as proposals.

They are incorporated accordingly in the ICRC’s directions to its delegates and in the draft agreements they are instructed to submit to the competent authorities.18

Both in international and internal armed conflicts, the detaining authorities may be somewhat reluctant to apply the ICRC’s operational principles.

What they most strongly oppose is interviews without witnesses. At the 1929 Diplomatic Conference, for example, some government representatives voiced their fears, in suitably quavering tones, that the interviews might be used for espionage purposes.19 This indeed is the usual pretext on which ICRC delegates are refused permission to converse freely with captives. It is appallingly absurd, for obviously a detaining power does all it can to prevent prisoners from collecting information on what goes on outside the camps, if only to prevent their reporting on it if they escape to their own lines, and whatever intelligence they may be able to pick up before capture is out of date long before they are put in a camp. Moreover, for there to be any danger of spying there would have to be active collusion by the delegates of the Protecting Powers or of the ICRC, and a knowledge of military matters which those delegates do not have. The real reason for the authorities’ refusal is quite different. They are afraid the prisoners will tell the unpalatable truth about the conditions in which they are detained and the interrogations they have undergone. In practice it is always where the Geneva Conventions are least respected that the detaining authorities most strongly oppose the principle of interviews without witnesses.

For reasons of expediency20 and after lengthy discussion the 1929 Conference finally adopted the phrase ‘as a general rule without witnesses’. Notoriously, this restriction led to serious abuses. In Japan, for example, the ICRC delegates were always accompanied by Japanese officers, and were sometimes brought face to face with prisoners of war who had been forbidden to say a word or make the slightest movement. This made a grim travesty of the ICRC visit.21

The 1949 Diplomatic Conference took a firmer line. It maintained that the right of visiting delegates to interview without witnesses any prisoners they might choose was not subject to any reservation or restriction whatsoever.22

Although the provisions of the 1949 Conventions are crystal clear it may still happen, even in an international armed conflict, that ICRC delegates are authorized to visit prisoner-of-war or civilian internee camps but forbidden to converse freely with the captives there.

The ICRC is then on the horns of a dilemma.23 Either it does not allow its delegates to visit prisoners on conditions contrary to those prescribed in the Conventions, in which case it deprives the captives of any humanitarian help
it might well be able to give, or it accepts the detaining power’s conditions, thereby endorsing a breach of the Conventions.

Any such situation must be considered on its merits, weighing the immediate interests of the captives against the long-term interests of war victims. There are, however, six good reasons why the ICRC should refuse any such concession:

a) If the ICRC permits its delegates to visit prisoner-of-war or civilian internee camps where they are not allowed to interview any prisoners they wish in private, it puts the prisoners in the awkward and indeed inhumane situation of being unable to talk freely without risking reprisals.

b) The delegates cannot reach impartial conclusions, because the detaining authorities will be free to put their own case whereas the prisoners will not be able to talk freely.24

c) If the delegates cannot interview the prisoners without witnesses, they may easily overlook serious abuses which they will appear to countenance by their mere presence, and attempts at ‘window-dressing’ or more elaborate deceit can never be entirely ruled out.

d) In its dealings with a particular state the ICRC should not renounce a right which is granted to it by the international community.

e) The ICRC could not possibly renounce this right in its relations with one of the belligerents without violating the principle of impartiality.

f) The ICRC must take care not to create any precedent that would weaken the authority of the Geneva Conventions or restrict their scope.

Thus in all situations in which the Geneva Conventions are applicable, it appears consonant with international humanitarian law and with the long-term interests of protected persons that unless the conditions set out in those Conventions are met, the ICRC should not permit its delegates to visit prisoner of war or civilian internee camps. In my opinion the ICRC should not deviate from its operational principles, which are based on the Conventions themselves. If it must do so, then this should be only in the most exceptional circumstances.

This policy has the advantage of clarity. It means that the detaining power must either allow ICRC visits to prisoners to be conducted in accordance with the relevant provisions, or take sole responsibility for rejecting a monitoring procedure instituted by the Conventions.

The problem becomes more sensitive in non-international armed conflicts because neither Article 3 of the 1949 Conventions nor Protocol II lay down the conditions in which visits to places of detention in such conflicts must be conducted. Since there is no obligation in such conflicts to allow ICRC delegates to visit prisoners, each party may subject such visits to whatever conditions it pleases without violating the Conventions, since they are silent in this respect.

Conversely, the ICRC is clearly not bound to submit to requirements that would prejudice the humanitarian character and credibility of its opera-
tions. Besides, the first three of the above arguments apply to internal conflicts just as much as to international conflicts.

In either kind of conflict, visiting delegates who are not allowed to interview prisoners without witnesses put those prisoners in a difficult situation, indeed, an inhumane one; there can be no guarantee that their conclusions are impartial, and there will always be the danger that merely by making the visit they will appear to set the seal of approval on abuses and maltreatment that have not come to their notice.

It seems to me that these arguments are decisive, and that in internal and international conflicts alike the ICRC should not normally permit its delegates to visit places of detention unless they are allowed to interview prisoners there without witnesses. Unless the ICRC can obtain permission for its delegates to work in conditions that provide sufficient guarantees, it is preferable that they should make no visits, rather than visits that might turn out to be of no humanitarian value and whose conclusions would not be worthy of belief.

Nevertheless, there are admittedly some exceptional situations in which ICRC delegates can give some captives the protection and moral support they need merely by noting their identity and the fact that they are held by a particular authority, even if they meet them in the presence of the detaining authorities. Obviously, the theoretical conclusions set forth above should not prevent ICRC delegates from meeting these prisoners, especially when the prisoners’ lives may hang in the balance, as so often happened during the Lebanese civil war (1975–90). But it must be clearly understood that these are not visits to a place of detention in the usual meaning of the term, and will not be the subject of reports such as are routinely made on standard visits to places of detention, which the detaining authority could thereafter proudly exhibit as good-conduct certificates or as proof that it possesses the international status which it claims for itself.

Politics is the art of the possible, and so, unfortunately, is the conduct of a humanitarian operation. Thus, in most of the conflicts whose victims the ICRC has tried to protect, it has had to strike a balance between respect for its own operational principles and the concessions which it may sometimes have to make. In no conflict was this predicament as extreme as in the Vietnam War.

In accordance with its usual practice the ICRC asked that its delegates be permitted to visit all persons detained because of the hostilities, both north and south of the 17th parallel. The Democratic Republic of Vietnam flatly refused; the Hanoi authorities claimed that the ICRC’s offers of services were inadmissible owing to the origin of the conflict and invoked their reservation to Article 85 of the Third Geneva Convention. The National Liberation Front gave an equally curt refusal.

The situation was more complex in the areas controlled by the Republic of Vietnam. The authorities in Saigon and their American allies classified prisoners in an excessively complicated way, by their origin and circumstances of
capture, and this classification determined the extent to which the ICRC could take action. Its delegates were permitted in principle to visit prisoner-of-war camps and speak in private with any prisoners they wished, but their work for civilians held in prisons and ‘re-education centres’ was subject to severe restrictions and interviews without witnesses were not allowed there.

Since visits in such circumstances could do little good, the ICRC suspended them several times in an effort to get permission for its delegates to work in more favourable conditions. But after several months it agreed to resume its visits to civilian detainees, on receiving verbal assurances that were subsequently never honoured.

Finally, in the spring of 1971, the ICRC delegates stationed in Saigon asked the ICRC to stop all visits to civilian prisoners until interviews without witnesses were authorized. Their request was supported by the ICRC’s Delegate-General for Asia and Oceania. The delegates declared that the restrictions imposed by the Saigon authorities deprived the visits of any humanitarian effect and all too often reduced them to a farce. The visits, they pointed out, were pointless and deceptive because they misled the detainees into believing that their conditions would be improved; they could moreover even endanger detainees who, by making complaints in the presence of the detaining authorities, exposed themselves to reprisals that the ICRC could do nothing to prevent. Also, the delegates said, their visits could be interpreted as sanctioning abuses that might be committed without their knowledge in the places of detention that they visited.

This protest placed the ICRC in a quandary. It was well aware that because it could do nothing to help prisoners held by North Vietnam and the National Liberation Front, it was in a weak position vis-à-vis the Saigon authorities and the United States government. Also, the ICRC feared that it would jeopardize its humanitarian activities for prisoners of war in South Vietnam if it adopted an attitude with regard to civilian prisoners that the Saigon authorities could interpret as breaking off relations. The ICRC was torn between reluctance to abandon civilian prisoners to their fate, and the knowledge that the only protection it could give them as things stood was worth little or nothing.

In the end the ICRC overruled the recommendation of its delegates stationed in Saigon and decided to continue its visits to civilian prisoners until further notice, even if it achieved no useful result by reiterating its requests for authorization to interview them without witnesses.

In March 1972, however, the Saigon authorities took a new offensive by the Communist partisans as a pretext to order a temporary suspension of the ICRC’s visits. The ICRC then decided not to resume its visits until interviews without witnesses were authorized, but as the South Vietnamese government refused to consider any new arrangements, that decision marked the end of the ICRC’s activities in aid of civilian detainees.

The North Vietnamese authorities, for their part, constantly objected that the ICRC had for too long allowed its delegates to visit prisons and re-
education centres in South Vietnam in circumstances that gave their inmates no protection, and by doing so had countenanced the abuses and atrocities which according to their – the authorities’ – information were everyday occurrences there. It must be admitted that their criticism was not unfounded.

Subsequent events, especially statements by released detainees, showed that the ICRC had been right in March 1972 to end an ambiguous situation that had gone on too long, and that it would have done better to follow its delegates’ advice much sooner than it did.27

The International Committee’s experience in Vietnam showed that it had to decide on a firm and consistent approach to this issue, such as had been sadly lacking during the conflict. It therefore adopted guidelines which reflect the operational principles mentioned above and have directed its policy in subsequent conflicts.

For example, in spring 1978 the ICRC, wishing to put into effect the agreement in principle reached during a mission by its President to Algiers, sent a team of delegates to the Tindouf area to begin visiting Moroccan and Mauritanian prisoners held by the Polisario Front. But as the delegates could not get permission to visit all the prisoners and to interview any of them without witnesses, the ICRC came to the conclusion that it could not carry out the visits, and recalled its delegates.28

The ICRC paid dearly for taking this firm line, for it was then prevented for many years from visiting the prisoners held by either side.

A similar situation arose the following year in the Socialist Republic of Vietnam. With the consent of the Vietnamese government, the ICRC sent a temporary mission to Hanoi in April 1979 to visit Chinese prisoners of war captured in the hostilities of February. However, as authorization was withheld for its mission to meet all the prisoners and interview any of them without witnesses, the International Committee found it preferable to recall its mission and to continue its discussions on the subject with the Vietnamese authorities. These negotiations were successful, and the Vietnamese authorities invited the ICRC to send out a new mission in May 1979, when the delegates were allowed to visit Thai Nguyen camp, meet 187 Chinese prisoners of war, and interview them freely without witnesses. The delegates were, however, unable to meet ten prisoners who were working outside the camp on the day of the visit.29

As the above examples show, practical experience and legal analysis lead to the same conclusions.

3. The purpose of visits to places of detention

Any human activity is shaped by the purpose it is intended to serve. Accordingly, before describing how visits to places of detention are carried out it may be useful to explain what the ICRC and the states party to the Geneva Conventions hope to achieve by them.
All the ICRC’s activities are designed to help war victims. Here, too, their interests will determine its objectives and course of action.

Its prime concern in visiting places of detention will be to provide protection. Protection is the underlying purpose of humanitarian law as a whole, and is enshrined in the principle of humanity which directs all of Red Cross and Red Crescent action. But what gives protection is rules – rules that prohibit or restrict violence and thereby save its potential victims. ICRC representatives can only contribute to the faithful application of the rules. They are no substitutes for them.

Protection is therefore always by rule. Its purpose is to ensure that war victims enjoy the rights the Geneva Conventions and humanitarian principles recognize as their due, in particular the right to life, to preservation of their physical integrity and human dignity, to the basic necessities and to the necessary medical care to maintain life and health.

All the same, the idea of protection is essentially negative in that it is preventive: its purpose is to prevent suffering and death, cruel treatment, arbitrary acts, reprisals, etc. Similarly, the main purpose of visits to places of detention is to protect prisoners from threats, violence and arbitrary acts, cruel treatment and execution. In this regard, what delegates actually do for prisoners matters less than the suffering their visit might prevent. In many cases, though unfortunately not all, repeated visits are often a sufficient protection.

The ICRC’s second aim is to improve the prisoners’ conditions of detention. It can do so in many ways. Negotiation and the normal methods of diplomacy will be used to bring about all improvements that depend on a decision by the detaining power or an agreement between belligerents. The ICRC can also take steps itself, or in co-operation with other institutions, to give the prisoners moral or material assistance. This second aim is therefore essentially positive.

Both these aims – to protect captives and to improve their situation – are a logical extension of the ICRC’s original mandate. It is simply including prisoners of war and civilian detainees in its constant concern to alleviate the suffering caused by war.

However, visits to places of detention also have very specific objectives.

For the ICRC, the first objective is to find out about the conditions of detention. Its interest is clear from the active part it played in drafting the humanitarian Conventions, and its role as guardian of the Fundamental Principles of the Red Cross and Red Crescent. It consequently expects its delegates to report as fully, accurately and objectively as possible on the living conditions of prisoners of war and civilian detainees. Their reports will enable it to formulate its requests for improvements. Only requests based on firsthand information are likely to have the desired results.

ICRC visits to places of detention are also of use to the Central Tracing Agency, for the delegates can check and update lists of prisoners, ask them to fill in capture cards, gather information on missing persons and restore contact between prisoners and their families.
Lastly, the information collected during such visits will show where relief operations are needed, while subsequent visits will provide an opportunity to check that relief supplies are being properly distributed.

Visits to places of detention also enable the ICRC to relay firsthand information to the states concerned.

The interest of the power of origin – or in the case of prisoners of war, the power in whose armed forces they were serving when captured – in receiving such information is also clear. As a party to the Geneva Conventions it can claim the benefit of them for its nationals in enemy hands; it will therefore obviously want to know their true situation. If their rights are not respected the power of origin is entitled to intervene via the Protecting Power representing its interests or the International Committee. It can send relief supplies to its nationals through the same channels.

The detaining power is no less interested in knowing the facts, for it is accountable to the international community for the way in which it applies the humanitarian Conventions to enemy nationals. Experience shows that the competent authorities are often ill-informed about the actual living conditions of captives in their hands, for the reports they receive are watered down by every successive official in the chain of command. Even camp commanders are often ill informed, because the language barrier, suspicion and enmity prevent them from communicating easily with their captives. The only persons who can establish relations based on mutual trust with the detaining authorities and also with the prisoners are neutral delegates, whose firsthand reports consequently provide political leaders with otherwise unobtainable information.

But there may also be a further objective. It is worth remembering that the ICRC made its first visits to prisoner-of-war camps in the winter of 1914–15 to put a stop to irresponsible propaganda giving distorted and extremely alarming accounts of the situation of prisoners of war and calling for reprisals which, by their own momentum, were leading almost inexorably to the breakdown of the whole system of legal protection.31

A similar situation arose in May 1940 during the French campaign. On receiving a report that a German airman who had made a forced landing near Charleville had been set upon by the local inhabitants, the government of the Third Reich announced that for every German airman put to death fifty Allied prisoners would be shot immediately. The only reason this threat was not carried out was that ICRC delegates established that this pilot and other airmen captured by the French forces had been transferred to prisoner-of-war camps in southern France and were being held there in conditions which complied with the 1929 Convention.32

The vicious spiral of allegations of ill-treatment, reprisals and counter-reprisals occurs in every war. Only impartial information from neutral delegates who are allowed to speak freely with captives can reassure the authorities and scotch rumours deliberately inflated by war propaganda. The ICRC has always been discreet about its efforts to prevent reprisals, but to do
so is one of its most constant concerns, and its visits to places of detention are therefore a vital part of the protection prescribed by the Conventions. Objective information is often the first stage of protection.

4. The various phases of the visit

The Geneva Conventions do not say how visits to places of detention are to be carried out, but if ever there was an ICRC activity that shows evidence of a continuous and uniform practice it is surely this one. The procedure followed by ICRC delegates visiting prisoner of war camps has hardly varied since the first visits in the winter of 1914–15, which suggests that it is determined by the nature of the work itself. How it is done can be deduced from the Committee’s instructions to its delegates.

A visit to a prison camp obviously has to be prepared in advance. Delegates must have prior interviews with the relevant authorities such as the Ministry of Defence or Ministry of the Interior, the General Staff, internment service and national information bureau on prisoners of war, during which the delegates make sure that the authorities understand and accept the operational principles of the ICRC, namely that its delegates must have access to all places of detention, be able to meet all prisoners and interview any of them without witnesses, and be free to make return visits.

Delegates must also first obtain as much information as possible from the authorities about the laws, decrees and regulations relating to prisoners of war and civilian detainees, and find out whether capture cards and lists of prisoners have been sent to the Central Tracing Agency as required by Articles 70 and 122 of the Third Convention and 106 and 137 of the Fourth Convention. Delegates not accompanied by a liaison officer will generally be given a letter of introduction to the camp commander.

Once a delegate has done all this – often in haste, for the sooner the visit is made, the better – he (or she, for like all the ICRC’s other activities, visits are also carried out by women delegates) can set out for the camp. He will usually be accompanied by a medical delegate – an ICRC doctor or sometimes a nurse – and, if the camp is a large one, by one or more colleagues. Soon the stark outline of watch-towers and a forbidding perimeter fence of barbed wire loom before them, and they know that they have reached their destination.

The visit always starts with an interview with the camp commander; the delegate explains the purpose of the visit, stresses that it is being made for strictly humanitarian reasons, says how he intends to carry it out and assures the commander that he will not discuss politics or military matters, especially when interviewing prisoners without witnesses. He also stresses that the only information which is of interest to the ICRC concerns the conditions of detention and the prisoners’ personal and family problems, and informs the camp commander that at the end of the visit he will let him know his findings and recommendations.
The camp commander gives the delegate statistics as to the number, rank and status of prisoners in the camp, and full information about its organization – the number of huts, their capacity, facilities for medical treatment, laundering and replacement of clothing, kitchen organization and monitoring of food rations, compulsory work and precautions against accidents, payment of wages and prisoners’ allowances, management of the canteen (the camp shop), facilities for leisure, physical exercise and religious observance, prisoners’ mail, the reception and distribution of relief supplies, and regulations on order and discipline. The delegate must pay special attention to information about labour detachments and other groups of prisoners who might be outside the camp on the day of the visit.

If there have been previous visits to the camp the delegate asks what has been done since the last visit, how far his suggestions have been put into practice, and to what extent the competent authorities have acted on the assurances they gave him.

The initial interview with the camp commander gives the delegate a preliminary idea of conditions in the camp; an incomplete idea, to be sure, but one that he will be able to complete and correct if necessary by inspecting the premises and interviewing prisoners. The purpose of the initial interview is also to establish a relationship of mutual trust with the camp commander, otherwise the visit may easily take place in a tense atmosphere that does nothing to further the ICRC’s humanitarian aims and could do the prisoners more harm than good.

The delegate then visits the camp in detail, generally accompanied by the camp commander or his assistant and the prisoners’ representative.36

Prison camps look much alike. They usually consist of long rows of wooden, brick or corrugated iron huts, or tents, separated by straight paths to facilitate constant surveillance. In the middle of the camp is the parade ground for roll calls, which also serves as exercise yard and sports ground; near the entrance are the administrative buildings, the mail room, storerooms for food and relief supplies, kitchens and workshops. At the opposite end of the camp are the infirmary and punishment cells. Sometimes there is a common room, a chapel, and a row of graves. Around it all is the ‘universal symbol of captivity’, the perimeter fence of barbed wire, with watch towers and guard posts at intervals.37

The delegate must inspect each hut. He must estimate the area and volume (living space and amount of air per prisoner), ventilation, lighting and heating of the dormitories. He must examine the furniture, generally consisting of two- or three-tier bunks, a few tables and chairs, and shelves or pigeon holes for prisoners’ personal belongings. He must check on the condition of blankets, fire-fighting equipment and facilities for speedy evacuation of the hut in case of fire or air-raid warning.

Similarly, the delegate must examine all installations for hygiene and ablutions, such as showers, latrines, washbasins, laundry facilities, drinking water supplies and waste water disposal. He must inspect the kitchen equipment...
and food stores, note the menus and quantities of food allowed so as to calculate the nutritional value of daily rations, and talk with the prisoners on kitchen duty.

The medical delegate pays particular attention to the infirmary. He must talk with the medical officer appointed by the detaining authority, with doctors and medical orderlies among the prisoners themselves, and with patients. He must check the available equipment and stocks of medicines, consult the register of patients, note their names and medical disorders and if necessary give them a medical examination, note the treatment given and the number of deaths and their causes. He must ask about facilities for emergency transport and admission to hospital, about precautions taken against epidemics, and what equipment, medicines, vaccines, and so forth, are most urgently needed.

The delegate must visit the common room, mail room, canteen and relief store, note the books available and enquire into facilities for leisure, study and religious observance. He must also visit the workshops and enquire into working conditions, working hours, and compliance with provisions in the Conventions relating to prohibited work, safety precautions and payment of wages. If prisoners are employed outside the camp he must take care to meet them when they return in the evening, or ask to visit their work-sites. Lastly, he must visit the punishment cells and note the duration and nature of the punishments meted out, as well as the names of the prisoners punished.

The delegate’s visit must be complete and systematic. He must ask for every door to be opened for him and meet all the prisoners. He must enter all the dormitories, even if they are all built on the same model, and inspect all punishment cells, empty or not; for if he failed to visit a single hut or meet any group of prisoners, or was prevented from doing so, this would be enough to raise the very suspicions that his visit is intended to prevent. His visit must be thorough; it must not neglect any significant detail of the prisoners’ living conditions. It must be exhaustive; the delegate must find out whether the Conventions are being fully complied with.

Every possible source of information must be used. The medical delegate, for instance, must take a good look at the patients’ register, and the delegate must examine the list of daily menus and the punishment register, note the price list in the canteen, and scan the notice boards bearing orders, disciplinary regulations, daily schedules, hours of compulsory work and time of lights out, and the text of the Geneva Convention.

He will be able to clear up many questions immediately by talking to the camp commander and the prisoners’ representative.

Above all, during his inspection of the camp premises he will be able to meet and question the prisoners in the dormitories and common room, at work in the workshops, doing fatigues in the kitchen or elsewhere, the wounded and sick in the infirmary, the inmates of the punishment cells, and the men working outside the camp.
This part of the visit may last several hours, or in large camps two or three days, and the delegate must use it to examine the entire premises. More important still, he must meet the captives, talk with them and assess their physical and mental health and psychological condition, for to visit a prison camp and be oblivious to anything other than its installations would be to miss the essential object of the exercise. Of course it is important to inspect dormitories, sanitary facilities, kitchens and so on, but this is only one way of finding out how the prisoners live. Delegates will learn much more about this by observing their faces, expressions and the look in their eyes, and by paying attention to barely perceptible signs of fear or emotion such as trembling hands or lips, a tone of voice, a glazed stare or evasive eyes, than by carefully measuring dormitories and punishment cells. Discomfort and dilapidated accommodation are often much easier for prisoners to bear than fear and oppression. Judged only by their perfect design, some places of detention are models of penitentiary architecture; but they may really be appalling masterpieces of inhumanity, for the very reason that their impeccable design makes round-the-clock supervision possible, destroys all privacy and all trace of free will, stifles imagination and serves a policy which, by intentionally depriving prisoners of any sense of individuality or value as human beings, does them serious harm.

The principle of interviews without witnesses having been accepted by the detaining authorities before the visit, of which it is a condition sine qua non, the delegate will start by interviewing the prisoners’ representative, and then other prisoners who may be able to brief him on the conditions of their captivity, such as doctors and chaplains, NCOs in charge of dormitories, and heads of detachments. On his tour of inspection he will probably be approached by prisoners asking to speak to him. In a small camp he notes their names and does his best to meet them singly, but in a large camp holding hundreds or even thousands of prisoners he will let the inmates know that he cannot hear individual complaints but will discuss with any spokesman they wish to appoint to represent them.

The camp commander has no authority to restrict the number or choice of the prisoners with whom the delegate decides to speak in private, for the Geneva Conventions give the ICRC and the Protecting Powers the unconditional right to interview prisoners without witnesses. The delegate is therefore completely free to choose those he wants to interview. There may of course be a language barrier to interviews without witnesses. Ideally, the delegate should understand the prisoners’ language, or the ICRC should include an interpreter in its delegation. Otherwise the delegate will choose an interpreter from among the prisoners.

The delegate must see to it that his interviews with prisoners deal primarily with life in the camp and conditions of detention. As in his initial interview with the camp commander, he must enquire into all aspects of the prisoners’ living conditions, particularly those he has not been able to see for himself, and try to assess the prisoners’ state of mind and morale and any latent
tension between them and their guards or between various groups of prisoners. He must also use interviews without witnesses to ascertain whether mail and any relief supplies sent to the prisoners by the ICRC have duly arrived, and whether distributions have been regularly and properly conducted in his absence.

The delegate must do all he can to take note of the countless individual requests made to him by prisoners or their spokesman. These will be from prisoners who have no news of their families, civilian detainees whose families are not visiting them or are in dire poverty, wounded or sick prisoners asking for early repatriation, and so on. The longer their captivity lasts, the more such cases there will be, leading to growing despair, hatred and violence. The delegate must, however, firmly refuse to be drawn into political discussion. He is well aware that any such digression would be contrary to the purpose of his visit and at once cause the authorities and prisoners to lose trust in him.

As always happens in war, many complaints will be made to him of brutality and ill-treatment.

If the incidents are alleged to have taken place in the place of detention he is visiting, the delegate must not fail to take careful note of the statements made by the prisoners concerned, and of any information or explanations given him on the subject by the camp commander. The medical delegate must examine the complainants and note any marks or after-effects of ill-treatment. If the alleged facts are sufficiently serious the delegate may call for an enquiry, but he must not allow himself to be inveigled into acting as an examining magistrate (a role for which he is not qualified), and must strictly abstain from expressing any opinion on disputed facts that he has not verified himself. If, however, the complaints relate to another place of detention, in which case they will generally be complaints of maltreatment or cruelty during interrogation before transfer to a prison camp, it is debatable whether a delegate is bound to take note of them.

There are two sides to this particularly sensitive question, and no plain solution. It can be argued that the delegate is visiting a specific place of detention and that it is not his business to record unprovable complaints of alleged ill-treatment in other places of detention. Conversely, it can be argued that the whole purpose of his visit is to record prisoners’ living conditions, which are very severely affected by ill-treatment, wherever inflicted.

Unfortunately the Committee’s practice gives no clear answer. Although the same question has arisen in nearly all conflicts the ICRC does not appear to have specific guidelines leading to a reasonably uniform response to it.

Some years ago a number of experienced delegates recommended the adoption of what was called the ‘four walls’ policy, according to which the ICRC’s assigned task was solely to inspect prisoners’ living conditions within the four walls of the place of detention being visited. It held that while delegates should not of course show indifference to alleged maltreatment of prisoners in another place of detention, they should say they were not
empowered to record complaints about it. This policy has not, however, been systematically applied.

In my view the deciding factor should be the purpose of visits to places of detention. What matters most is not the state of the premises, but a true insight into the prisoners’ living conditions. It should therefore be unthinkable to ignore complaints of ill-treatment, regardless of where they are said to have taken place, or to apply the ‘four walls’ policy unless delegates have free access to all places of detention, including interrogation centres, police stations, and the like. The policy should never be applied where delegates are refused access to such places, for if it were, maltreatment or cruelty need only be restricted to places delegates were not authorized to visit for them to be unable to report it. The most traumatic aspect of prisoners’ lives would then be concealed and the delegates’ visit would be reduced to a mere shortened formality that fights shy of essentials. This would seriously undermine the protection which the ICRC is mandated to provide, and it might justly be accused of countenancing the very abuses that it exists to prevent.

If the ‘four walls’ policy is not applied, a delegate may admittedly be snowed under by systematically exaggerated complaints he cannot verify. He can forestall this, however, by making the prisoners understand that he can do nothing to improve their living conditions unless the detaining authority continues to regard him as credible, and that if they abuse his good faith they will ruin his credibility and therefore his ability to help them. He must make perfectly clear to them that all that he will do is report what he has been told, and that he will be extremely careful not to endorse allegations he has not been able to check. The rest is a matter of common sense, a critical mind and judgement.

At the end of the visit the delegate always has a final interview with the commander of the place of detention and gives him a full account of his findings during his visit and conversations with the prisoners. He mentions the good and bad points, so that the commander can take whatever decisions are necessary in full knowledge of the facts. The delegate may suggest ways of improving the prisoners’ living conditions and will say which remarks and proposals he intends to submit to the higher authorities; it is after all important that the visit should lead to real improvements and that the prisoners’ expectations should not be disappointed. He will ask the commander for his comments, and offer to support requests the commander may decide to make to his superiors. The aim is to bring about a genuine dialogue and the realization that the interests of both parties are not opposed but are ultimately the same.

Belles prisons,
Laides amours,
Jamais ne furent

Prisons lovely,
Loves unlovely,
Never were
as Ronsard says. The delegate will often have to report complaints made to him, and whenever possible should immediately broach them with the commander. If this approach is inconclusive he will have to decide whether to put the complaints to the higher authorities himself or simply inform the ICRC, which will then decide what further steps to take.\footnote{If there has been any incident leading to a prisoner’s death or serious injury, or any allegation of ill-treatment, he may demand that the authorities institute an official enquiry, in accordance with Article 121 of the Third Convention or Article 131 of the Fourth Convention and notify him of its results.} If there has been any incident leading to a prisoner’s death or serious injury, or any allegation of ill-treatment, he may demand that the authorities institute an official enquiry, in accordance with Article 121 of the Third Convention or Article 131 of the Fourth Convention and notify him of its results.\footnote{If there has been any incident leading to a prisoner’s death or serious injury, or any allegation of ill-treatment, he may demand that the authorities institute an official enquiry, in accordance with Article 121 of the Third Convention or Article 131 of the Fourth Convention and notify him of its results.}

Lastly, the delegate will inform the commander of his general impression as to the living conditions in the camp and compliance there with the Geneva Conventions.

The delegate’s work will not end with his visit to the prison camp, where he will have raised great hopes, many of them, unfortunately, in vain.

He will have to report on his visit to the higher authorities – including the Ministries of Foreign Affairs, Defence or the Interior, and the General Staff, and acquaint them with his findings and suggestions. To get results quickly he will often have to make repeated representations to various government departments such as those dealing with detention or internment, health, food supplies and censorship. If his findings are sufficiently serious and urgent he will approach the country’s highest authorities directly.

If he has observed urgent needs that the official services cannot meet, he will inform the ICRC and suggest that an emergency relief operation be set up. He will have to procure food, medicines, clothing or blankets and get them cleared by customs, transported and distributed.\footnote{After each visit there will be an exchange of correspondence with the Central Tracing Agency, which will be sent lists of prisoners or capture cards, requests for news, information on missing persons and replies to tracing requests, so that it can deal with the countless individual applications made by captives and their families.}

After each visit there will be an exchange of correspondence with the Central Tracing Agency, which will be sent lists of prisoners or capture cards, requests for news, information on missing persons and replies to tracing requests, so that it can deal with the countless individual applications made by captives and their families.

The delegate may have to return to the camp a few days later to check whether the commander has made the promised improvements, or to clear up outstanding matters or distribute relief supplies.

Throughout his visit a delegate makes pages and pages of notes for the report he has to send the ICRC. The next three sections will deal with that report.

Visits to civilian places of detention follow the same course: first comes an interview with the officer in charge, then the delegate inspects the premises, interviews detainees in private, and has a final interview with the said officer. Since the provisions of the Conventions and the operational principles governing visits by ICRC delegates are identical, whether the visits are to prisoners of war or to civilian detainees, this is not surprising. After all, in both cases the activity is the same.

However, the persons receiving the visits are different, and the delegate must therefore pay special attention to the problems of civilian detainees. For
example women, and families with children, should have separate living accommodation and suitable facilities; the discipline to which they are subject should respect the dignity of women and ensure that they are treated with all the consideration due to their sex; and they should be allowed some privacy and family life; civilian detainees should be authorized to receive visits by relatives who are not in custody.

The delegate must also bear in mind the difference in kind between prisoners of war and civilian detainees. Prisoners of war are soldiers. They form a homogeneous group under military discipline and are led by officers and NCOs of the same nationality as themselves. Civilian prisoners are entirely different, being divided by differences in income, social standing and legal status. They are not a close-knit community, only co-existing families and clans each bent on preserving its individuality. More often than not, their private concerns prevail over the common interest. The delegate cannot ignore this. He will have to have interviews without witnesses, for example, with many inmates and ask the same question a hundred times before he can get an idea of the general situation.

Prison camps are not the sort of thing one builds in peacetime, and when war comes civilian and military authorities have other things in mind. When a delegate makes his first visit, therefore, many camps look like huge building sites, with prisoners busily putting up the huts they are to live in. Other camps may be in an old fortress or disused factory, a warehouse, a garage, or some other requisitioned building built for a completely different purpose. The delegate must make allowances for this and for the particular circumstances of the country concerned, but he must also respect the ICRC’s operational principles and keep to the various phases of his visit. Reduced to essentials – the initial interview with the camp commander, inspection of camp premises, interviews in private with prisoners and the final interview with the camp commander – the visiting procedure applies to all situations and all places where prisoners are held, such as camps for prisoners of war or civilian detainees, re-education centres, labour camps, transit camps, prisons, penitentiaries, police stations, hospitals and clinics.

Are ICRC delegates authorized to visit prison camps without notice? This question must be settled by an agreement between the detaining power and the ICRC, for the Geneva Conventions neither explicitly mention the possibility nor rule it out.48

In practice, notice of the visit usually has to be given. This is perhaps a pity, for a delegate making a snap visit could be sure that no special preparations had been made for it. But previous notice has its advantages as well as disadvantages, for a delegate can then meet the camp commander and his deputies. Also, he is expected by the prisoners’ representative, the camp doctor and chaplain, who often have reports to give him on such things as distribution of relief supplies, or a list of medicines needed or of prisoners who are without news from their families.49
But if a delegate does give prior notice of his visit, will not the camp authorities indulge in ‘window-dressing’ or cover up more serious problems?

‘Window-dressing’, yes. Improvements are often made to impress a visiting delegate. He will find freshly repainted walls, brand-new installations, and daily rations increased only a few days previously. If these improvements are lasting, so much the better; they may be looked upon as advance results of his visit. If they are only temporary this will emerge when he interviews prisoners without witnesses or makes a return visit to the place of detention. If the ICRC’s operational principles are respected they are therefore a sound insurance against any such cover-up, and a guarantee that the delegate will get a true picture of life in the camp. If they are not respected, the delegate’s report to the Committee on his visit to the camp will not be objective, and the Committee’s efforts to protect prisoners will not carry conviction.

5. The preparation of reports on visits to places of detention

One objective of ICRC visits to camps for prisoners of war and civilian detainees is to inform the ICRC, and through it the authorities concerned, about the captives’ living conditions.

Delegates must draw up a separate report for each visit, and send it to the ICRC in Geneva by the quickest means available. If the post is too slow they must send a summary of the report by telegraph, fax or electronic mail.

The report must be strictly objective. It must be constructive and state exactly what the delegates have seen for themselves and what they have learned from the detaining authorities and the prisoners. It should not contain subjective remarks or the delegates’ personal impressions, or any remarks unrelated to the conditions of detention. It should be, so to speak, an X-ray of those conditions.

Delegates accordingly follow a model originally outlined during the First World War. The headings which follow correspond more or less to the various stages of the visit. This model enables a clearer account to be given of all matters examined during the visit than any other document. Although it is somewhat technical, a closer look at the contents is therefore of interest.

The following is the layout for a report on visits to prisoners of war. The relevant articles of the Third Convention are shown in brackets after each heading.

**Layout of report for visits to prisoner-of-war camps**

**Title**

Specify the detaining power, give the official name of the camp and the names of the ICRC delegates who made the visit and of any person accompanying
them (liaison officer, other government representative, National Society delegate or representative of another relief organization, etc.).

1. Date of visit

2. Date of previous visit

3. Administration
   - Camp Commander (Article 39)
   - Deputy(ies)
   - Medical officer(s)
   - Medical orderly (ies)
   - Chaplain(s)
   - Prisoners’ representative (Articles 79–81)
   - POW doctor(s) (Article 33)
   - POW chaplain(s) (Article 35)
   - Interpreter(s) (Article 126, para. 1).

4. Capacity (Article 25, para. 2)
   Camp capacity according to the detaining authorities, and delegate’s own estimate if it differs substantially.

5. Number and status of prisoners
   Number on the day of the visit. Specify:
   - the number of officers
   - the number of NCOs
   - the number of private soldiers
   - the number of civilians (if any)
   - the number of women (if any).
   Number at previous visit. Specify changes since previous visit:
   - admissions
   - transfers (Articles 46–8)
   - repatriations (Articles 109 and 110)
   - releases on parole (Article 21, paras. 2 and 3)
   - escapes (Articles 91–4)
   - releases (Article 118)
   - deaths (Articles 120 and 121).

6. Nationality
   The name of the power in whose armed forces the prisoners of war were serving when captured.
7. Location and climate (Articles 22 and 23)
Geographical location and altitude of the camp. Climate according to season. State whether the camp is in an unhealthy or dangerous area.

8. General description (Articles 22 and 23)
- Type of premises (barracks, huts, tents), state of premises, shape and number of buildings of each kind, their previous use
- Marking of the camp by the letters PG or PW
- Type of fencing and security regulations
- Lie of the land around the camp.

9. Quarters (Articles 22, 23 and 25)
- Description of premises (officers’ dormitories, soldiers’ dormitories, cells, huts, tents, etc.)
- Ventilation, air circulation, natural and artificial lighting, heating
- Capacity of the premises, number of prisoners in the camp and number per cell or room
- Furniture and bedding
- Precautions against fire and, if any, air raid shelters.

10. Hygiene (Article 29)
- Description of installations: washrooms, latrines, showers, water tanks, hot and cold water supply, drainage
- Distribution of soap and washing powder, facilities for cleaning and disinfecting clothing and for eliminating vermin
- Access to sanitary installations by day and by night. Specify how often prisoners can have hot showers, etc.

11. Medical care (Articles 30–3)
- Description of the infirmary and all other medical facilities, such as consulting rooms, isolation ward for contagious diseases, dental surgery, and pharmacy; description of their furniture, equipment and instruments
- Medical staff appointed by the detaining authority, and POW doctors, dentists and other specialists, medical orderlies and nursing aides
- Organization of medical care: frequency and duration of medical consultations, number of patients examined at each consultation, interval between medical inspections, possibility to call in specialists from outside, facilities for emergency evacuation to a military or civilian hospital; available dental and other specialist care; medical register; facilities for POW doctors and medical orderlies to treat prisoners of war
- State of medical stocks; storage and supply system; specify whether prisoners have individual first-aid kits
Main medical disorders, medical disorders of patients in the infirmary, vaccinations, precautions against epidemics
- Whether there are any wounded or sick eligible for repatriation under Articles 109 and 110
- Number and cause of deaths, issue and forwarding of death certificates, burial services and care of graves (Articles 120 and 121).

12. **Clothing (Article 27)**
- Description of day clothes and nightwear, working clothes and changes of clothing
- State and source of uniforms
- Personal effects that prisoners of war may retain, including protective equipment (helmets, gas masks, groundsheets)
- Upkeep of clothing and replacement of worn-out clothing.

13. **Food (Article 26)**
- Description of the kitchen and food stores, and of fittings, equipment and utensils available
- Origin and storage of food; distribution of drinking water
- Number and composition of meals, nutritional value of daily rations; facilities for inspection by the prisoners’ representative
- POW participation in the preparation of meals
- Refectory, plates and dishes, conditions in which prisoners eat their meals.

14. **Work (Articles 49–57 and 62)**
- Type of labour inside and outside the camp
- Description of workshops, equipment and tools
- Number of prisoners compelled to work inside or outside the camp; working schedule and conditions; specify whether the daily break and the weekly day of rest are respected
- Compliance with the provisions in the Conventions relating to prohibited, unhealthy or dangerous work
- Safety precautions; accident insurance for prisoners who work.

15. **Financial resources (Articles 58–68)**
Method of payment of wages and military pay, amounts allocated, prisoners’ personal accounts, withdrawal of cash, remittances to and from the family.

16. **Canteen (Article 28)**
- Goods on sale, prices, source of the goods sold, restrictions on the use of certain articles such as tobacco
- Canteen organization, display of prices, checking of accounts, use made of profits.
17. Leisure and physical exercise (Article 38)

- Description of facilities available: common room or reading room, exercise yard, sports ground
- Equipment available: books, games, musical instruments, radio or TV set, cinema, gymnastic apparatus, footballs, etc.
- Encouragement of intellectual, educational and recreational pursuits, sports and games; free time, conditions for access to reading room and sports ground, possibility to listen to radio and hold lectures, shows and concerts, facilities for study, permitted and prohibited games, etc.

18. Relations with the outside (Articles 70–4)

- Sending of capture cards, number of cards or letters that prisoners may send, possibility to send legal documents such as certificates, powers of attorney and wills, any restrictions on correspondence, exemption from postal charges
- Distribution of mail and parcels addressed to prisoners, organization of censorship, time taken by censorship, delays in correspondence, prisoners without news
- Possibility for prisoners’ representatives to correspond freely with the military authorities and the Protecting Power (Article 78).

19. Religious observance (Articles 34–7)

- Description of premises used for religious services: chapel (or mosque, pagoda, etc.), common room or exercise yard
- Presence of chaplains (priests, imams, rabbis, etc.) among the prisoners, or visits by clergy from outside
- Organization and frequency of religious services, respect for freedom of belief
- Availability of sacred books and devotional objects.

20. Treatment and discipline (Articles 41–2 and 82–9)

- Is the text of the Geneva Convention posted up? Are all orders and regulations in the prisoners’ own language?
- Daily orders, time of lights-out, etc.
- Wearing of badges of rank, saluting, respect for officers’ rights
- General attitude of the prisoners, their relations with the guards and camp commander (can they make complaints, how are these treated, is there a complaints book, etc.?)
- Nature and duration of disciplinary punishments, number of prisoners who have undergone disciplinary punishments or judicial proceedings
- Description of punishment cells
- Escapes, attempted escapes and other incidents.
21. **Interviews with prisoners of war (Article 126)**

The delegate must state whether he was able to interview any prisoner of his choice without witnesses or any time limit, particularly the prisoners’ representative, and specify the choice and origin of the interpreter. The delegate must also note down under this heading any complaint or request by prisoners that is worthy of mention but does not come under any of the previous headings, provided it relates to conditions of detention (ill-treatment on capture or during interrogation or transfer, any incident involving the use of weapons, indoctrination, delay in repatriation of seriously wounded prisoners, etc.).

22. **Final interview with the camp commander**

The delegate must cite the improvements made in the camp since his previous visit and the main questions raised during the final interview, including prisoners’ complaints and requests passed on by him to the commander, and the latter’s reply thereto. The delegate must state his own suggestions for improving the conditions of detention, and the decisions, orders and pledges of the officer in charge to put them into effect.

23. **Final remarks**

The delegate must give his general opinion of the camp he has visited and of the prevailing atmosphere there. This should not be a subjective opinion but a reasoned conclusion drawn from and illustrating all his observations under the previous headings, and therefore based on all his observations during the visit. In doing so he must bear in mind the general circumstances of the detaining power and whether it is able, in practical terms, to comply with all the requirements of the Geneva Convention.

24. **Assistance**

Under this heading mention must be made of all the relief supplies (food, clothing, toilet articles, tobacco, medicines, and so on) received from the ICRC, a National Society or any other institution aiding the prisoners, the visits made by representatives of those institutions, and the conditions in which the supplies were distributed.

25. **Government action**

The delegate must specify the proposals for improving conditions of detention that have been submitted to the higher authorities, urgent measures needed, approaches already made and those that should be made.

**Documents attached**

The delegate may attach supporting documents giving useful information, such as the disciplinary regulations, extracts from the meals list, death and
other certificates, and a list of the relief supplies distributed during his visit, with an addendum on future relief operations, and other items.

Reports on visits to places of detention for civilians must follow the same model, taking into account the status of the persons visited and the provisions applicable to them.55

This model is of course a working document, which delegates must if necessary adapt to local conditions. It would obviously be absurd to report on heating arrangements in a tropical prison camp, or on ventilation where prisoners sleep in the open. In general, delegates must allow for local conditions, including the possibly limited resources of the detaining power. They cannot expect conditions of detention in a country whose economy has been ruined by the war to be as good as in a prosperous country with ample resources. This is a matter of common sense and tact which usually presents no difficulty.

The finished report must be sent without delay to the International Committee in Geneva for immediate ‘processing’ by the departments concerned, such as the Central Tracing Agency, and the Medical and Relief Divisions.

All reports are revised at ICRC headquarters. The ICRC does not censor their content, but merely finalizes their presentation – gives them all the same format, corrects awkward phrases, and ruthlessly deletes subjective expressions that might have crept into a report written in the heat of action, but are out of place in an official document.

The report can then be passed on to the authorities concerned.

In brief, reports on visits should give a complete, impartial, objective picture of the conditions of detention, mentioning the good points observed during the visit as well as the bad ones. Where delegates have not been able to verify the facts by seeing for themselves, they must give both the detaining authorities’ and the prisoners’ point of view. It must be immediately and unmistakably clear from the report what the delegates have seen for themselves and what third parties have told them.

Reports on visits are neither a plea for the defence nor for the prosecution. Still less are they documentaries highlighting sensational features unrepresentative of general conditions. Readers who do not know the aims of these reports may well get the impression that they were written by unfeeling observers without any sympathy for the prisoners they meet during their visits. This is certainly not true. There are other reasons for this seeming indifference; the delegates know well that if their own statements are not objective the International Committee’s reports will no longer carry any weight, and it will therefore be powerless to improve the prisoners’ conditions. What looks like coldness on the delegates’ part in fact reflects a quest for objectivity, similar to a scientific approach.
6. The addressees of reports on visits

One purpose of visits to places of detention is to inform the competent authorities of the true situation of prisoners of war and civilian detainees. This is done mainly by delegates’ reports – so the question arises as to whom the ICRC should send them.

The Geneva Conventions do not prescribe the way in which ICRC reports on visits to places of detention should be prepared or to whom they should be sent, and there is no resolution on the subject by International Conferences of the Red Cross. To find out the legal basis for this particular ICRC activity and the rules applicable to it, we shall have to review ICRC practice.

During the First World War the International Committee circulated its delegates’ reports very widely, publishing them in series and sending them not only to all governments and National Societies but also to subscribers to the Bulletin international des Sociétés de la Croix-Rouge, the principal press agencies, and some newspapers. They were on sale in bookshops, and several series were reprinted. There was no need to decide on any specific addressees – anybody could buy the reports and do what they liked with them.

In the Second World War, however, the Committee ceased regular publication of its delegates’ reports, only reproducing extracts from them periodically in the Revue internationale de la Croix-Rouge, as part of a summary of the ICRC’s activities.

The reports were sent simultaneously to the prisoners’ power of origin and the detaining power, in the form of identical cyclostyled copies (in cases where prisoners of war had served in the armed forces of a state of which they were not nationals, reports on visits were sent to that state instead of the power of origin). The ICRC did not send them to other institutions, but referred persons and associations wishing to consult the reports to the governments concerned. National Societies could obtain them from their own government.

As a general rule the reports were transmitted in French. When translations were requested, only one version was held to be authentic, so as to rule out any divergence between the texts sent to each of the parties.

The reports written by the delegates were sent to the ICRC in Geneva, which revised them, made any necessary modifications and passed them on to the governments concerned. In principle, delegates were not allowed to give their official contacts copies of reports that had not been revised in Geneva. The ICRC waived this rule only in the Far East conflict because of the delays caused by severed postal communications, but even then the official version of the report was finalized in Geneva and sent to the parties to the conflict as confirmation. Only that official version was held to be authentic.

The reports sent to the detaining power were accompanied by a covering letter drawing attention to the most important passages, the deficiencies
noted and the complaints registered by the delegates. The prisoners’ power of origin was informed of the deficiencies mentioned in the covering letter and of steps to have them remedied.58

This practice was in accordance with three important considerations:

a) It respected the principle of the equality of belligerents before the laws of war.

b) It maintained the integrity of the official text: the copies sent to the parties were absolutely identical, and where translated only one version was held to be authentic.

c) It underscored the official character of the reports: the ICRC regarded them as official documents for which it was responsible as an institution, and not as papers for which its delegates were personally responsible.

The Report of the International Committee of the Red Cross on its Activities during the Second World War records the procedure followed in preparing and communicating reports on visits.59 This procedure does not appear to have attracted criticism. The same principles have been followed in international conflicts since the Second World War, for instance those between India and Pakistan, between Israel and the Arab states, between China and Vietnam, between Iran and Iraq, and in the South Atlantic conflict. The belligerents do not appear to have criticized the practice adopted.60

It may therefore be concluded that the ICRC’s regular practice, widely accepted by parties to conflict, is that in conflicts between states identical reports on visits are communicated simultaneously to the prisoners’ power of origin and to the detaining power.

This rule is in keeping with the principle of neutrality and the principle of the equality of belligerents before the law of war. Its purpose is to give each party exact information; where the reports show that either of them is not meeting its treaty obligations, it enables the ICRC to remind the offending authorities of their responsibilities.

However, it is not automatically applicable in all circumstances. For example, if a party to a conflict rejects the International Committee’s offers of services and refuses to allow it to visit prisoners held by that party, the ICRC is obviously not bound to send it reports on visits by ICRC delegates to the adverse party’s places of detention. Indeed, it should refrain from doing so, for it should certainly not do anything that might give one party to a conflict a political or propaganda advantage over the other. A power which forbade the ICRC to visit its places of detention but nevertheless received such reports could use the information contained in them against the adverse party, which would then be in an inferior position even if it had fully complied with its obligations under the Conventions.

Conversely the ICRC is duty-bound, for the victims’ sake, to send its delegates’ reports to a detaining power which allows it to visit its places of
Visits to Places of Detention

Detention, so that any shortcomings observed there are brought to its notice and put right.

Thus if a party to a conflict rejects the Committee’s offers of services and refuses to co-operate with it, the ICRC should not send that party reports on visits to prisoners held by the adverse party. This is not contrary to the principle of impartiality, for the impartiality of the ICRC is sufficiently proved by it offering its services equally to both parties.61

In any war waged by a coalition of states, prisoners may be transferred from one detaining power to another. Obviously, the power that captured the prisoners and the power to which they are transferred must share responsibility for them.62 The ICRC is therefore entitled to send its reports to the power that captured them, the power holding them at the time of the visit, and the captives’ power of origin.63

Similarly, in any such war a belligerent may hold prisoners in captivity on the territory of one of its allies. In that case the state on whose territory the prisoners are held, and the belligerent in whose power they are, will likewise share responsibility for them. The ICRC must therefore send its reports to the state on whose territory the prisoners are held, the state holding them at the time of the visit, and their power of origin.64

In internal conflicts it is infinitely more difficult to decide on the appropriate addressees for reports on visits. Non-international armed conflicts are not a homogeneous category; they comprise a wide range of very different situations, in law and in actual fact. At one end of the range are clashes of limited intensity – hardly more than riots and isolated, sporadic acts of violence – between armed but only loosely organized groups. At the other end are veritable civil wars between two parties each exercising de facto control over a substantial part of the national territory and its population, and deploying organized armed forces under responsible command. The law applicable to such conflicts varies just as much. In some cases only Article 3 of the 1949 Conventions applies; in others, Article 3 and Protocol II both apply. In further cases, most of the laws and customs of war apply by virtue of a recognition of belligerency or for other reasons.

This wide variety of de facto situations and sets of rules applicable inevitably affects the ICRC’s ability to intervene. In some cases only one of the parties to the conflict, and in other cases both parties, will allow ICRC delegates to visit prisoners in places of detention under their respective control. Hence the difficulty of establishing guidelines for the communication of reports on visits in internal conflicts.

Many different solutions have been adopted in practice. In the civil war in Greece (1945–9) the only camps which ICRC delegates were allowed to visit were those holding insurgents captured by government forces. The ICRC sent its reports on visits to the Greek government in Athens via the Hellenic Red Cross, but not to the insurgent party, with which the International Committee was not in touch.65
In the civil war in Nigeria (1967–70), ICRC delegates were allowed access to prisoners captured by either side. The ICRC sent its reports on prisoners held by the federal forces only to the federal military government, and on prisoners held by the secessionist forces to the secessionist authorities only.66

In some phases of the civil war in Chad (for example in 1978 and 1979) ICRC delegates were allowed access to prisoners captured by the Chad National Liberation Front (FROLINAT) and to prisoners captured by the Chad national army (ANT). The ICRC sent its reports on government soldiers captured by FROLINAT, and those on FROLINAT combatants captured by the national army, both to the Chad government in N’Djamena and to the FROLINAT command.67

These past variations in the International Committee’s practice show how difficult it is to lay down guidelines applicable to all internal conflicts.

The difficulty is no less in wars of national liberation. The 1974–7 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law decided, in the terms of Article 1, paragraph 4, of Protocol I, that ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’ are international armed conflicts to which the Geneva Conventions and Protocol I apply.

One does not have to be a genius to realize that any government faced with this sort of situation will refuse to be branded a colonial dominating power, an alien occupant or a racist régime, and will therefore deny that the conflict it has on its hands comes under Article I, paragraph 4, of Protocol I.

The International Committee will then be caught between two fires. The liberation movement will claim that the conflict is an international one. On the strength of that claim it will press the ICRC for reports on its delegates’ visits. It will regard the communication of such reports to it as evidence, or recognition, of the international status it claims. The adverse party will affirm equally strongly that the conflict is solely an internal matter, and will therefore object to the communication of ICRC reports to its enemies, whom it persists in regarding as insurgents or mere rebels devoid of any legal personality under international law.

Both sides will therefore attribute an entirely unwarranted political or legal significance to the communication of ICRC reports.

Clearly, the Committee is not qualified to arbitrate in a dispute of this kind. Besides, Article 1, paragraph 4, of Protocol I is so worded that the ICRC could not recognize the conflict as a war of national liberation without implicitly casting doubt on the legitimacy of one of the parties to the conflict. This would be a violation of the fundamental Red Cross and Red Crescent principles.

Nevertheless, the question whether reports on visits should be communicated in such circumstances remains, for some liberation movements have asked the ICRC for reports on its visits to their captured militants.
To avoid random action the ICRC found it necessary to adopt guidelines for a consistent approach. After careful consideration, it concluded that it would be contrary to its humanitarian mission, and therefore inadmissible, to make the communication of reports on visits depend on the legal status of parties to the conflict. It resolved to consider only two alternatives, both depending strictly on the positions adopted by the parties to the conflict themselves:

- where the parties agree that the conflict is an international one, to transmit identical reports on visits simultaneously to the detaining power and the prisoners’ power of origin (except if one of the parties to the conflict rejects the ICRC’s offers of services and refuses to allow it to visit the prisoners held);
- in all other circumstances, always to transmit reports on visits to the authority holding the prisoners concerned, and if that authority raises no objection in principle, also to the authority the prisoners acknowledge as their own.

This procedure is not altogether unexceptionable, but it does solve the problems that arise in all kinds of conflicts – international armed conflicts, internal conflicts, wars of national liberation, and internal disturbances and tensions – as to the appropriate addressees for such reports, without the ICRC having to decide on the nature of the conflict when the parties’ views on this point and on their respective legal status diverge. It is a solution strictly in accordance with the principles of impartiality and neutrality, and also with the principle of the equality of belligerents before the law of war, which underlies the law of armed conflict and the whole of humanitarian law. In my view, this procedure is fully consonant with the ICRC’s humanitarian mission.

7. The use made of reports on visits

Reports by ICRC delegates on their visits to places of detention are intended to give the International Committee, and the authorities to whom it will send them, impartial and objective information on the living conditions of prisoners of war or civilians in captivity, and suggest any necessary improvements. That being so, the addressees may legitimately circulate them internally to the various departments concerned. The ICRC does not normally need to concern itself with this; each party to the conflict may do as it pleases.

Whether the reports may be circulated outside those departments is a very different matter. The main question here is whether reports on visits may be published, either by the International Committee, or by the authorities to whom they are sent.

As mentioned above, throughout the First World War the ICRC regularly published its delegates’ reports on visits and clearly did all it could to ensure their wide circulation. But in the Second World War it confined itself to pub-
lishing extracts from them at regular intervals in the *Revue internationale de la Croix-Rouge*, as part of reports on the work of ICRC missions. Since the Second World War the ICRC has not published reports on visits in any form, regarding them as official documents solely for the information of the authorities to whom they were sent. It has not deviated from this operational rule for more than fifty years.

The Committee has repeatedly come under fire for this obstinate preference for discretion. It has been accused of keeping its delegates’ findings to itself and keeping quiet about breaches of the humanitarian Conventions. Some critics have not hesitated to go one step further and vilify it with allegations of complicity and collusion. It is therefore worth considering whether the ICRC should publish its delegates’ reports.

A place of detention is by definition a closed area; any information gathered there is to some extent confidential. One reason why the states party to the Geneva Conventions have acknowledged the right of ICRC delegates to enter camps for prisoners of war and civilian detainees and interview them without witnesses is that the ICRC had shown that it used the information collected during these visits conscientiously and discreetly. Moreover, before embarking on a programme of visits the ICRC is often required to confirm its pledge of discretion. Those who criticize it for not publishing its delegates’ reports pretend not to know that if the Committee did not apply its self-imposed rule of discretion it would hardly ever have been allowed to visit the prisoners concerned.

However, the ICRC does not in fact keep its delegates’ reports to itself; it generally communicates them to the detaining power and to the prisoners’ power of origin.

We now come to the second question, whether the authorities to which the ICRC transmits its delegates’ reports have leave to publish them.

In the Second World War the ICRC considered that the governments to which it sent reports on visits could do what they liked with them; they were free to pass them on to agencies asking for them, and even to publish them. Later on, the growing danger of political exploitation, and a number of unfortunate incidents in which its freedom of action was jeopardized by ill-judged publication, caused the ICRC to revise this view. It then concluded that the reports were solely for the confidential information of the authorities to which they were communicated. This view has not always been shared by the addressees.

To my mind, the question should be examined by reference to law. The ICRC is not bound, either by the Conventions or by customary law, to transmit its delegates’ reports to the authorities concerned. It is therefore entitled to fix the conditions for doing so. It has three options:

- to allow unrestricted publication of reports on visits;
- to forbid their publication; or
- to regulate their publication.
War is no longer fought only by armed men. The belligerents’ arsenal now includes political manoeuvre and poisonous propaganda, and the International Committee unfortunately has to work in this context. Political capital is made out of reports on visits published in an incomplete or distorted form; humanitarian activities then come under cross-fire from propaganda, and the polemics inevitably generated can ruin the ICRC’s reputation for being discreet, jeopardize its humanitarian work, and harm the very victims it endeavours to protect. For all these reasons the first of the above options must be rejected.

The second, a complete ban on publication, therefore seems inescapable, but experience has shown that the ICRC is hardly able to enforce it. Belligerents have quite often divulged reports on visits, either openly or more frequently by ‘leaking’ them.

The ICRC has of course protested, but there is little it can do to stop them. All it can do is refuse from then on to send its delegates’ reports to authorities that had divulged them, but this might have a backlash effect on the captives, for reports on visits are one of the most effective means of bringing about improvements in conditions of detention. This is doubtless why the ICRC, as far as I know, has never gone to these lengths.

There remains the third option: stating the conditions on which reports may be published. These are self-evident – they must be published in full, and all reports on any given situation must be published together. By giving an overall view, the disadvantages of incomplete publication are avoided and the risks of political exploitation are reduced. If a belligerent fails to comply with these conditions, the ICRC can itself make known or publish all reports made in connection with that particular conflict and thus put the facts straight. Clearly, the ICRC is no longer bound by any pledge of discretion when dealing with belligerents who take it on themselves to publish its delegates’ reports. Whereas an absolute ban on publication tends to be disregarded, the ICRC seems able to put over its demands for publication subject to certain conditions.

In my view, this is the only realistic policy. It is also the one ultimately adopted by the ICRC.71

8. Limits to the ICRC’s entitlement to visit prisoners

As a general rule ICRC delegates visiting places of detention are entitled to meet all medical personnel protected by the First or Second Geneva Convention, all prisoners of war protected by the Third Convention, and all civilians (whether interned, awaiting trial, or sentenced by a court of law) who are protected by the Fourth Convention. The International Committee is thus qualified to concern itself with all persons protected by the Geneva Conventions.
In other words, the extent to which the ICRC is competent to concern itself with prisoners depends on how far the Geneva Conventions and their Additional Protocols are applicable \textit{ratione personae}.

This is basically a question of interpretation of the Conventions. Much has been written on the subject, but it lies outside the scope of this work and will not be discussed here. However, in three cases – war criminals, spies and saboteurs, and mercenaries – the ICRC’s competence to concern itself with protected persons as just defined has been restricted by a provision in the Conventions or by the use of reservations. Each of these cases will now be considered in turn.

\textbf{War criminals}

Every army in the field commits excesses. War being a systematic use of violence, the less clear the dividing line between acts of violence not forbidden by the laws and customs of war, and non-permissible violence (war crimes), the more excesses there will be.

To prevent war from degenerating into an uncontrolled frenzy of violence, each belligerent has the obligation to repress war crimes committed by its nationals and in particular by members of its armed forces, and the right to repress those committed by enemy nationals who fall into its hands.

In actual fact, however, the vast majority of war crimes are not prosecuted. Each warring party will hesitate to put members of its armed forces on trial for acts that will often be attributed to excessive military ardour or patriotic zeal, and will hesitate to prosecute enemy nationals in wartime for fear of reprisals. In practice, only if hostilities end in the utter defeat of one of the warring parties, as with the German and Japanese capitulations of 1945, will it be possible to prosecute and punish war crimes, and then only those of the losing side.

Most of the accused will be members of the adverse party’s armed forces, militias or other volunteer corps. At this point the question of their status will arise, namely whether an enemy soldier prosecuted or sentenced for violating the laws and customs of war is still entitled to the protection of the rules he has himself transgressed, or, in other words, to prisoner-of-war status.

This question arose at the end of the Second World War because of the enormity of the crimes imputed to the German and Japanese armies, and because of the large numbers of German or Japanese soldiers brought before Allied courts to stand trial for crimes committed before capture. The courts generally refused them the protection of the 1929 Convention, and especially of its judicial guarantees. They justified their refusal on the following grounds:

a) It is an old and well-established principle of customary law that those who have violated the laws of war cannot invoke the benefit of them; enemy soldiers who have committed war crimes are therefore not entitled to prisoner-of-war status.\textsuperscript{73}
b) The fact that the 1929 Convention made no mention of this matter shows that there was no intention of modifying the customary rules which already existed.  

c) The legal guarantees instituted by the 1929 Convention apply to prisoners prosecuted for offences committed during the period of captivity, but not to prisoners prosecuted for offences committed prior to captivity.

This argument is not supported by the preparatory work on the 1929 Convention and shows a blatant disregard for the fundamental principle that an accused person is deemed innocent until proved guilty. On the pretext of repressing war crimes it destroyed much of the protection given by the Convention, since it took for granted that the detaining authority could deprive enemy soldiers of prisoner-of-war status by a unilateral act for which it was not accountable to any judicial authority.

The International Committee took remedial action in the draft Convention relative to the treatment of prisoners of war which it submitted to the Seventeenth International Conference of the Red Cross, meeting in Stockholm in August 1948: it inserted a provision whereby prisoners of war prosecuted for acts committed before their capture were still entitled to the protection of the 1929 Convention, at any rate until being sentenced. The Stockholm Conference went even further by providing for prisoners of war prosecuted or sentenced for acts committed before their capture to remain entitled to protection by the Convention.

Fierce debate ensued at the 1949 Diplomatic Conference. The Soviet delegation tabled a draft amendment whereby prisoners of war convicted of war crimes and crimes against humanity under the legislation of the detaining power would be treated in the same way as persons serving a sentence for a criminal offence in the territory of the detaining power. In support of this proposal the Soviet delegates maintained that war criminals had by their own acts debarred themselves from the protection of the Convention, and that once found guilty and sentenced by a regularly constituted court they had no right to that protection and should be treated as common criminals.

This contention was opposed mainly by the Anglo-Saxon delegates, who argued that it was inadmissible to convict a person for failing to respect the rules of humanity, while at the same time refusing him the benefit of those rules; furthermore, by subjecting sentenced prisoners to domestic law, the Soviet draft amendment reintroduced unequal treatment that it was the very purpose of the Convention to remove.

It was unanimously agreed that the Third Convention authorized the repression of war crimes and crimes against humanity and that war criminals duly convicted by regularly constituted courts were no longer entitled to the full protection of the Convention, but only to the minimum safeguards it accorded to convicted prisoners of war. In spite of this agreement it proved impossible to reach a compromise, and when the vote was taken the Soviet draft amendment was rejected. The result was Article 85 of the Third Convention: ‘Prisoners of war prosecuted under the laws of the Detaining
Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.76

The Soviet Union and its allies lodged reservations to this article. Their wording varies slightly but the meaning is the same. The Soviet reservation reads:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.77

The war crimes and crimes against humanity referred to in this reservation are defined as follows in Article 6(b) and (c) of the Charter of the International Military Tribunal appended to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on 8 August 1945:

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.78

The crimes referred to in the Soviet reservation do not include crimes against peace, which are defined in Article 6(a) of the Charter of the International Military Tribunal. But for this important restriction it might be feared that in some circumstances most or all prisoners of war would be deprived of the protection afforded by the Convention after being convicted merely for taking part in a conflict branded as a war of aggression. The reservation authorizes no such extension; prisoners of war convicted on those grounds alone could not be deprived of the protection of the Convention.

In the opinion of some states, the reservation did not specify clearly enough when the prisoners would be deprived of the said protection. The Soviet government therefore made this point clear in a note dated 26 May 1955, whose text the Swiss Federal Council, as depositary of the Geneva Conventions, communicated to all states party thereto. It reads as follows:
As is shown by its wording, the reservation made by the Soviet Union concerning Article 85 of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War means that prisoners of war who have been convicted under Soviet law for war crimes or crimes against humanity must be subject to the conditions applied in the U.S.S.R. to all other persons undergoing punishment after conviction by the courts. Consequently, this category of persons does not benefit from the protection of the Convention once the sentence has become legally enforceable.

With regard to persons sentenced to terms of imprisonment, the protection of the Convention will only apply again after the sentence has been served. From that moment onwards, these persons will have the right to repatriation in the conditions laid down by the Convention.

Moreover, it should be remembered that the conditions applicable to all persons undergoing punishment under the laws of the U.S.S.R. are in every way in conformity with the requirements of humanity and health, and that corporal punishment is strictly forbidden by law. Furthermore, the prison authorities are obliged, under the regulations in force, to transmit immediately to the Soviet authorities concerned, for investigation, complaints of convicted persons with regard to their sentences, or requests for a review of their cases, and any other complaint whatsoever.79

This note faithfully reflects the attitude of the Soviet delegation throughout the Diplomatic Conference and clearly shows that accused persons remain entitled to all the guarantees instituted by the Third Convention, including the judicial guarantees in Articles 82 to 108, until their sentence becomes legally enforceable.

The reservation to Article 85 of the Third Convention restricts the ICRC’s capacity to fulfil its mandate, for the reserving states can use it to prevent the Committee from pursuing its activities in aid of prisoners deprived of the Convention’s protection. Those states are no longer obliged to allow family messages and relief supplies to be sent to prisoners duly sentenced for war crimes or crimes against humanity, and are also able to prevent ICRC delegates from visiting them.

States which have not made this reservation may also use it to obstruct the ICRC’s work for prisoners from reserving states who have been sentenced for the same crimes, for it is a well-established rule that if a reserving state can invoke its reservation in its relations with any other contracting party which has accepted it, expressly or tacitly, each of the states which have not made that reservation may in turn use it against the aforesaid state.80

The most alarming consequences of this reservation, however, stem less from its text, whose strictly limited scope was confirmed by the Soviet note of 26 May 1955, than from its implication that a war criminal is a person stripped of all human dignity who can be excluded from any humanitarian protection. Whenever a breach is made in the rampart of treaty protection, war takes over and arbitrary action follows.

This was shown all too clearly in the Vietnam war.
When the Democratic Republic of Vietnam acceded to the Geneva Conventions on 5 June 1957, it made the following reservation to Article 85 of the Third Convention:

The Democratic Republic of Vietnam declares that prisoners of war tried and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the Nuremberg Judicial Tribunal, shall not benefit from the provisions of the present Convention as is specified in Article 85.81

The text clearly shows that only prisoners of war tried and convicted of war crimes or crimes against humanity shall no longer benefit from the protection of the Third Convention. Like the Soviet reservation, the Vietnamese reservation takes effect only after conviction.

Nevertheless, in answer to the Committee’s appeal of 11 June 1965, the government of the Democratic Republic of Vietnam defined its position as follows:

As all the world is aware, the United States Government and its agents in Saigon are engaged in committing crimes in their war of aggression in Viet Nam, undermining peace, violating the laws and customs of war and perpetrating acts against humanity.

In order to compensate for its defeats in the undeclared war of aggression in South Viet Nam, the United States Government has, without any justification, given orders to its air and naval forces to make surprise attacks on the Democratic Republic of Viet Nam, in flagrant violation of the Geneva Agreements of 1954 on Viet Nam and of the rules of international law. It has employed napalm and phosphorus bombs, poisonous chemical products, and its aircraft and warships have indiscriminately bombed hospitals, schools, road transport stations, markets, villages, fishing vessels, churches, pagodas, etc., massacring large numbers of innocent civilians and violating the Geneva Conventions of August 12, 1949, for the protection of the victims of war, as well as other rules of war.

The people and the Government of the Democratic Republic of Viet Nam consider the actions of the United States Government and of its agents in Saigon as acts of piracy and regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Viet Nam, as major criminals caught in flagrante delicto and liable for judgement in accordance with the laws of the Democratic Republic of Viet Nam, although captured pilots are well treated. Authorization had been granted them to correspond with their families. However, the regulations concerning mail with the exterior having been recently infringed, the competent authorities of the Democratic Republic of Viet Nam have decided temporarily to suspend this correspondence. In future, if those concerned demonstrate their willingness to observe the regulations in force in the Democratic Republic of Viet Nam, the competent authorities could reconsider the question with a view to finding an appropriate solution.

In South Viet Nam, the Government of the United States and its agents in Saigon are also undertaking a war of great atrocity, employing against the civilian population arms and methods of warfare which have for long been prohibited by international law. The Government of the Democratic Republic of Viet Nam energetically condemns these barbarous acts committed by the Government of the
United States and its agents and declares that they must take entire responsibility for the crimes they have perpetrated.\textsuperscript{82}

This reply implicitly referred to, but did not explicitly quote, the Democratic Republic of Vietnam’s reservation to Article 85. Although this reservation related only to prisoners of war who had been tried \textit{and} convicted, and the American prisoners were never put on trial, the Hanoi government made use of it to obstruct all ICRC attempts to help the prisoners held by that government.

The United States and Saigon governments did not use North Vietnam’s reservation as an excuse for inflicting similar treatment on the North Vietnamese prisoners in their hands. But they did use the ICRC’s inability to do anything to help American or Vietnamese prisoners held north of the 17th Parallel as a pretext for restricting and hindering its activities south of the 17th parallel; and the North Vietnamese authorities and National Liberation Front (Vietcong) leaders were quick to blame the ICRC for this.\textsuperscript{83}

The Hanoi government again invoked its reservation to Article 85 when the ICRC asked permission for its delegates to meet the Chinese prisoners of war captured in the conflict between China and Vietnam of February 1979. After prolonged discussion, however, it ceased to do so and allowed delegates to visit the Thai Nguyen camp, where the prisoners were held, and interview any of them without witnesses. Their visit took place on 26 May 1979, and the prisoners were repatriated soon after in the presence of the ICRC delegates.\textsuperscript{84}

A reservation to any one provision of a treaty weakens the treaty as a whole. Allowing two different rules on the same subject to exist at the same time, it undermines the effectiveness and authority of that treaty far beyond the often very limited scope of its own text. The Vietnam War was a harsh reminder of how serious this eroding influence is, and it would therefore have been wise, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, to seek common ground on which to restore the unity of the humanitarian rules. The Conference achieved little in this direction, as will be seen from Article 75, paragraph 7, of Protocol I:

\begin{quote}
In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

\begin{enumerate}
\item persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
\item any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
\end{enumerate}
\end{quote}

This provision is a reminder that the Geneva Conventions and Protocol I do not prevent persons accused of war crimes or crimes against humanity from
being prosecuted and sentenced. At the same time – since the reservation to Article 85 of the Third Convention applies only after conviction – it confirms that accused persons retain the benefit of all the guarantees introduced by the Third Convention until their sentence becomes enforceable. Furthermore, prisoners convicted of war crimes or crimes against humanity and deprived of prisoner-of-war status by the said reservation continue to benefit at the very least by the fundamental guarantees introduced by Article 75 of Protocol I.

Only time will show whether the Conference really has managed to dispel all the doubts it claims to have removed.

**Spies and saboteurs**

The Fourth Convention protects all civilian persons who find themselves in the hands of the adverse party in time of conflict or occupation and are not protected by the First, Second or Third Convention; it also protects stateless persons and nationals of a neutral state who are in the territory of a party to conflict and cannot be effectively protected by the diplomatic services of their country of origin, as well as neutral nationals in occupied territory. However, the 1949 Diplomatic Conference did not define civilian persons, except in negative terms.

It is easy to see why. If they had been defined in positive terms, in the same way as the Third Convention gives a positive definition of prisoners of war, this might have left an intermediate category of enemy nationals who, in captivity, could be said to be neither prisoners of war as defined by the Third Convention nor civilian persons as defined by the Fourth Convention; they would then be deprived of any humanitarian protection whatsoever. The decision taken by the Conference allows no such conclusion. On the contrary, it means that all nationals of a belligerent who are in the power of the adverse party and are neither members of the armed forces’ medical services nor prisoners of war are civilians within the meaning of the Fourth Convention and are protected by it. There is no intermediate category.

Some delegations thought that this arrangement was open to abuse. For example, enemy nationals could take advantage of some countries’ hospitality to settle there long before hostilities began and act as spies or saboteurs. Once found out they would demand all the rights the Convention guarantees to harmless civilians. Similarly, in occupied territory it was to be expected that the population would do everything in its power to obstruct the invading forces, which consequently had to be able to maintain their security.

These delegations therefore proposed inserting a provision which they believed would strike a better balance between the rights of the state and those of protected persons, and would allow a waiver of some rules in the Convention. This proposal was supported mainly by the Anglo-Saxon delegates, and opposed by the Soviet Union and its allies.
The Conference failed to reach agreement, and eventually adopted the following provision only after successive votes. Thus Article 5 of the Fourth Convention reads:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the state, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such state.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the state or Occupying Power, as the case may be.86

The wording of this article is particularly unfortunate and leaves innumerable loopholes in the protection given by the Convention.

Only the term ‘spy’ refers to a reasonably clear notion in international law. In the words of Article 29, paragraph 1, of the Hague Regulations of 1907:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.87

There is, however, no instrument of international law that defines the term ‘saboteur’. In the present context it means a person who commits clandestine acts of destruction in order to weaken the enemy’s industrial or military potential. The terms ‘definite suspicion’ and ‘activities hostile to the security of the state or Occupying Power’ leave room for extremely wide interpretation.

It is no easier to assess the effect of this provision. Yet one thing is certain: it does not allow anyone to be deprived of the status of civilian person in the way the reservation made by some states to Article 85 of the Third Convention allows military personnel convicted of war crimes or crimes against humanity to be deprived of prisoner-of-war status. On the territory of a party to the conflict, Article 5 means only that an individual person definitely suspected of activities hostile to the security of the state ‘shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State’. It follows that the said provision does not affect the obligations of the detaining authority towards the adverse party or third persons.
In occupied territory, individuals arrested as spies or saboteurs or because they are individually under definite suspicion of activity harmful to the security of the Occupying Power therefore do not forfeit any rights other than the ‘rights of communication’ conferred by the Fourth Convention; their other rights are not affected by this provision.

It is anything but clear from the text whether the detaining power is entitled under Article 5 to forbid ICRC delegates visiting places of detention to meet individuals detained as spies or saboteurs or under definite suspicion of activities harmful to the security of the state or occupying power.

However, the right to meet civilian prisoners and interview them without witnesses does not belong primarily to protected persons, but to the representatives of the Protecting Powers and to the International Committee’s delegates. Article 143 of the Fourth Convention leaves no room for doubt on this point. It must therefore be concluded that Article 5 of the Fourth Convention does not preclude visits by representatives of the Protecting Powers or by ICRC delegates.

Nevertheless, the article is badly drafted, allows serious differences of interpretation, and weakens the entire system of protection provided by the Conventions.

The territories occupied by Israel in the conflict of 1967 were a case in point. Most of the civilians arrested by the Israeli army were suspected of espionage, sabotage or other activities prejudicial to the security of the occupying power. Once arrested, they were kept incommunicado for periods of interrogation lasting sometimes for weeks or months. Without explicitly referring to Article 5 of the Fourth Convention, which they did not recognize as applicable to the territories occupied in June 1967, the Israeli authorities cited the needs of the enquiry as grounds for refusing permission to ICRC delegates to meet detainees under interrogation. This restriction seriously reduced the effectiveness of ICRC visits to places of detention. Accordingly the International Committee persisted in its requests that its delegates be allowed access to all detainees without exception, or at least that the interrogation period for which its delegates were barred from meeting detainees should be shorter.88

In November 1977, after lengthy negotiations, the Israeli authorities and the ICRC agreed on a new procedure whereby the ICRC would be notified of the arrest of protected persons within fourteen days of their arrest. Also within that same period, delegates would be allowed to meet all detainees, including detainees under interrogation, freely and without witnesses. Visits to detainees under interrogation could be repeated once every fourteen days until the end of the period of interrogation and would aim essentially at ascertaining their state of health. If necessary, an ICRC physician could make an additional visit. Lastly, the Israeli authorities undertook to conduct an enquiry whenever one was justified by the delegate’s report, and agreed to inform the ICRC of the findings and conclusions of each such enquiry.89 This agreement was later improved in certain respects90 and is still in force.
Between 1 January 1978 and 31 December 1991 ICRC delegates made 28,532 individual visits to detainees under interrogation, during which they met more than 20,000 prisoners.91

Despite these figures, the extent to which Article 5 of the Fourth Convention seriously undermines the system of protection laid down in the Conventions must not be underestimated. Unquestionably, the article does not authorize collective measures, and the persons to which it relates have to be humanely treated; but the fact remains that it enables many of the guarantees laid down in the Conventions to be withheld from persons who, being under suspicion, are the most likely to undergo violence and arbitrary treatment. As Mr Morosov, the Soviet delegate to the 1949 Conference, remarked, the article may render the entire Fourth Convention null and void.92

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law might therefore have been expected to remedy this situation. Unfortunately it did so only to a very limited extent.

To start with, Article 75 of Protocol I introduces fundamental guarantees covering any person who does not benefit from more favourable treatment, and therefore including spies and saboteurs. No provision is made, however, to monitor compliance with it.

In addition, under Article 45, paragraph 3, of Protocol I any person who has taken part in hostilities in occupied territory and is not entitled to prisoner-of-war status shall, unless held as a spy and notwithstanding Article 5 of the Fourth Convention, be entitled to the rights of communication under that Convention. Thus in occupied territory and when Protocol I is applicable, only spies, but not saboteurs, may be deprived of the said rights of communication.

Lastly, with regard to spies, the Diplomatic Conference adopted a long article relating only to members of armed forces engaging in espionage. It repeats Articles 29 to 31 of the Hague Regulations, but with many redundant phrases and obscure passages.93 Civilians engaging in or suspected of espionage still come under Article 5 of the Fourth Geneva Convention.

**Mercenaries**

From time immemorial young men from poor countries, especially mountainous regions, have had to seek a living abroad as mercenaries in the service of rulers of more prosperous countries.

There have been mercenaries since earliest antiquity. Xenophon’s *Anabasis* recounts the tribulations of the Greek mercenaries enrolled by Cyrus the Younger to make war on his brother Artaxerxes II for the crown of Persia. In eighteenth-century Europe, and until the middle of the nineteenth century, cannon fodder for royal armies came mainly from the Swiss cantons. There are still mercenaries today, such as the renowned Gurkhas of Nepal in the British and Indian armies.
Mercenaries may be broadly defined as persons who voluntarily and for pay enter the service of a country other than their own. Captured mercenaries cannot claim the status of neutral nationals, but may not be prosecuted solely for enrolling in the service of a belligerent power. If duly enlisted they must be considered as regular combatants who share the fate of their companions in arms. That is the gist of Article 17 of the Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907, which reads:

A neutral cannot avail himself of his neutrality
a) if he commits hostile acts against a belligerent;
b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.94

So if a neutral national was duly enlisted into the armed forces of a belligerent state or was a member of militias or other volunteer corps fulfilling the four conditions of Article 1 of the Regulations annexed to the Hague Convention IV of 1907, he is entitled to prisoner-of-war status. Those four conditions are: to be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war.

The same rule was adopted in the Third Geneva Convention of 12 August 1949: under Article 4 all captured members of the armed forces of a party to conflict, and captured members of its militias or volunteer corps that fulfil the aforesaid conditions, are prisoners of war. What qualifies them for prisoner-of-war status is therefore membership of the armed forces, militias or other volunteer corps of a party to conflict, and not their nationality.95

This is not to be wondered at. In spite of all the recent denunciations of mercenary warfare it must be remembered that, as has been said, there have been mercenaries for ages past, that many states (including some of their most ardent critics) still use them, and that international law does not regard mercenary service as illegal.96

Since decolonization, however, a new form of mercenary service has emerged whose economic basis is the reverse of the old one: soldiers of fortune from developed countries have gone to fight in Third World countries infinitely poorer than their own. This has led to serious abuses, especially in Africa, where mercenaries have been used to topple recognized governments or for covert intervention in civil wars. Others have turned their weapons against the government that took them into its service, and committed terribly destructive hostile acts that were to all appearances private wars.

The use of mercenaries in the Congo and Angola has provoked bitter resentment, voiced by the United Nations General Assembly in its Resolution 2465 (XXIII) of 20 December 1968, which declared ‘that the practice of
using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws'. 97 Similarly, in its Resolution 3103 (XXVIII), adopted on 12 December 1973, the General Assembly declared that:

The use of mercenaries by colonial and racist régimes against the national liberation movements struggles for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals. 98

Inevitably, this issue was raised at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law. After a debate dominated by ideological concerns and carefully fostering the confusion between mercenary service and private war, the Conference adopted the following provision (Protocol I, Article 47) by consensus:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
   (a) is specially recruited locally or abroad in order to fight in an armed conflict;
   (b) does, in fact, take a direct part in the hostilities;
   (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
   (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
   (e) is not a member of the armed forces of a Party to the conflict; and
   (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. 99

The definition adopted by the Diplomatic Conference is very restrictive, for it requires all the conditions enumerated in its paragraph 2 to be fulfilled cumulatively. It excludes individuals enlisted under long-term contracts, such as members of the French Foreign Legion and the Gurkhas of Nepal. It also excludes instructors and technicians teaching the use of weapons or maintaining weapons without taking direct part in hostilities, volunteers who have enlisted for other reasons than the desire for private gain, nationals of a party to the conflict and neutral nationals residing in territory controlled by a party to the conflict, members of the armed forces of a party to the conflict and soldiers sent on an official mission by a non-belligerent state.

In fact, the only persons covered by this definition are nationals of a neutral or non-belligerent state who take a direct part in hostilities as a lucrative occupation, and are not members of the armed forces of a party to the conflict. The definition is of private war rather than mercenary service.

Mercenaries who fulfil all the conditions stated in Article 47 are not entitled to prisoner-of-war status. They may be prosecuted and convicted merely for taking part in hostilities, but will still have the benefit of the fundamental
guarantees instituted by Article 75 of Protocol I, as the text of that article and
the preparatory work make perfectly clear.\textsuperscript{100}

In spite of the precautions taken by the Diplomatic Conference, Article 47
is, I think, out of place in a treaty of a humanitarian nature such as Protocol
I. It is not for a treaty of that kind to declare that certain persons are not en-
titled to prisoner-of-war status; furthermore, to proclaim in advance that a
mercenary is not entitled to such a status places him beyond the pale of
humanitarian law. Since he can be sentenced merely for his motives for enlist-
ing and taking part in hostilities, it would be unrealistic to expect him to
observe the laws and customs of war. Article 47 of Protocol I has many fail-
nings: it makes classification as a mercenary depend on a subjective factor such
as the desire for private gain, which it is practically impossible to prove; it
declares that a mercenary is not entitled to prisoner-of-war status, whilst
defining ‘mercenary’ in a way that covers only some kinds of mercenary
service and not all persons who would have been called mercenaries in the
past; and it allows a detaining authority to refuse prisoner-of-war status to
persons so defined, without being accountable for its refusal to any interna-
tional or legal authority. By so doing, Article 47 opens the door to many
abuses, and indeed beckons them in.

This became amply clear in the Iran-Iraq conflict: Iraq had enlisted many
soldiers from other Arab countries, and Iran refused prisoner-of-war status to
all combatants who were captured by its forces and were not Iraqi nationals.
The International Committee was denied access to these prisoners and could
do nothing for them.\textsuperscript{101}

At its forty-fourth session the General Assembly of the United Nations
adopted an International Convention against the Recruitment, Use, Financing
and Training of Mercenaries;\textsuperscript{102} with regard to armed conflicts, this
Convention, which also applies to other situations, largely takes over the defi-
nition of mercenaries given in Article 47 of Protocol I. Its purpose is to make
the prevention, prosecution and punishment of mercenary service compul-
sory and to organize international legal co-operation to eradicate it. It stipu-
lates, however, that any person arrested for trial or extradition shall be
entitled to communicate with a representative of the state of which he is a
national and may be visited by a representative of that state,\textsuperscript{103} and that any
state that wishes to do so may invite the International Committee to commu-
nicate with and visit the alleged offender.\textsuperscript{104}

In spite of its title, this Convention is less concerned with mercenary service
in the traditional sense of the term than with private war, for according to
the definition it has adopted the Convention does not apply to members of
the warring parties’ armed forces. Nevertheless there is every reason to fear
that the belligerents will avail themselves of it to deny humanitarian protec-
tion to enemy combatants who are not nationals of the adverse party, and to
prevent the ICRC from doing anything to help them.

*
Article 5 of the Fourth Convention, Article 47 of Protocol I and the reservations to Article 85 of the Third Convention all have one thing in common: they allow the detaining power – without any form of international verification and supervision – to deprive some persons of most of the guarantees of humanitarian law. The approach they take, and the unilateral character of the action they authorize, undermine the Conventions and open the door to abuses which experience has unfortunately shown to be very serious.

Spies and saboteurs do not deserve particular sympathy; neither do soldiers of fortune who wage other people’s wars to line their own pockets; and war criminals are the least deserving of all. Foul play that seriously threatens state security or violates the laws and customs of war certainly should be punished, and it is entirely possible to do so within the framework of humanitarian law and in full compliance with it. But it is shocking that the humanitarian Conventions themselves declare that certain persons should be deprived of any humanitarian protection requiring external supervision. And what a gross paradox it is to see some states take advantage of humanitarian rules to deny captured enemies the benefit of those very rules and obstruct the humanitarian work of the International Committee of the Red Cross!

This situation indubitably results from a complete misunderstanding of the function and purpose of humanitarian law. At the 1949 and 1974–7 Diplomatic Conferences delegates vied with each other in repeating that humanitarian law was not there to protect spies, saboteurs, mercenaries and war criminals. But that is not the point. Humanitarian law is there to protect all war victims, whatever reprehensible conduct is ascribed to them. Bar particular categories of prisoners from its scope and protection, and its basic principles and effectiveness will be drastically undermined.

Without wishing to make unfounded accusations, one cannot help noticing that when states took on new humanitarian commitments they left themselves a back door to escape from them; and for arbitrary action to move in. ‘The only treaties that would matter would be those concluded between ulterior motives’, says Paul Valéry. Alas, too true.

9. The development of ICRC practice

If the ICRC’s work could be expressed as a set of statistics, visits to places of detention would account for more than half the total. As they are usually the main activity of ICRC delegations, any detailed account of how the Committee’s practice has developed over time is not possible here. It would mean adding another volume to the present study, which is already too long.

A short and largely statistical account will therefore have to suffice, for which sixteen conflicts have been selected that were deemed particularly significant because of their widely differing character, the obstacles encountered and the successes and failures recorded.
i) The civil war in Greece

No sooner did the Second World War come to an end than Greece was riven by a civil war that continued until 1949.

Only in May 1947, however, was the International Committee allowed to come to the help of prisoners as part of a relief operation for the Greek population. ICRC delegates were allowed to visit detention camps on the islands of Yioûra, Makronissos, Chios and Ikaria, as well as prisons and hospitals. During their visits they distributed large quantities of relief supplies, mainly food, medicines, blankets and clothing.

The Committee’s attempts to establish relations with the insurgent party were unsuccessful, and ICRC delegates were never allowed to meet prisoners captured by the partisans.

The ICRC continued its relief operation until 1963, when the last prisoners were released. In all, its delegates made 194 visits to sixty-two places of detention and seven hospitals, visiting the two largest camps eleven times.106

ii) The Palestine conflict

In the spring of 1948 it was better not to be taken prisoner in Palestine. Neither the Jewish nor the Arab community was bound by the 1929 Geneva Conventions, and of all the Middle East states preparing to intervene, only Iraq and Egypt were party to them. Each side accused the other of giving no quarter and retaliated by giving no quarter itself. Hostage-taking was the rule; the hapless victims were usually executed. Prisoners on the battlefield were all too often shot out of hand.

On 12 March 1948 the International Committee appealed for safety for all persons taking no part in the hostilities, and for all combatants falling into the hands of the adverse party to be treated as prisoners of war.107 The Jewish Agency and the Arab Higher Committee for Palestine both agreed to comply with this appeal.108 Meanwhile the ICRC delegation did its utmost to trace kidnapped and captured persons, and to visit and protect them.

The Arab states’ intervention with regular armed forces on 15 May 1948 transformed a civil war into an international conflict to which the entire body of humanitarian law was applicable. Prisoner-of-war camps were set up in Israel, Transjordan and Egypt, whereas prisoners of war in Syria were housed in a prison. The number of prisoners rose steadily, and by the end of 1948 there were some 6000 Arab prisoners, including about 1000 combatants, in Israeli hands, and 673 Israeli prisoners in Transjordan, 147 in Egypt, forty-six in Syria and seven in Lebanon.

Prisoner-of-war status was granted only in Israel and Transjordan. In the other countries, where most of the prisoners were civilians, their status was hardly ever specified.

ICRC delegates regularly visited camps, prisons and hospitals where prisoners of war were held, and were allowed to speak freely with any prisoners
they wished. They also passed on lists of prisoners, family messages, individual parcels and collective relief, and repatriated seriously wounded and sick prisoners during the hostilities.

They continued their activities until the prisoners were repatriated under the armistice agreements concluded by Israel and its neighbours between March and May 1949.

ICRC delegates made thirty-six visits to places of detention in Israel, fourteen in Transjordan, fourteen in Syria and seven in Egypt, thus seventy-one visits in all. They also made many informal visits – to trace missing persons, collect and deliver mail or distribute relief supplies – on which no reports were drawn up and no statistics kept.109

iii) The Korean War

Twenty-four hours after hostilities began in Korea, the ICRC sent telegrams of identical content to the respective governments of the Republic of Korea and the Democratic Peoples’ Republic of Korea. In them it urged both sides to apply the humanitarian principles for the protection of war victims contained in the Geneva Conventions, even though Korea was not party to them, and drew particular attention to Article 3 thereof, which it quoted in full. The Committee sent similar messages to all other governments whose armed forces took part in the conflict, and to the United Nations.110

The government of South Korea declared that it was bound by Article 3, and on 15 July 1950 the government of North Korea informed the Secretary-General of the United Nations by telegram that the Peoples’ Army of the People’s Democratic Republic of Korea was strictly applying the principles of the Geneva Conventions relating to prisoners of war.111

In fact, however, the ICRC never succeeded in accrediting a delegate to the North Korean authorities and could do nothing to help prisoners captured by the North Korean forces or the Chinese People’s Volunteer Army. A letter sent by President Kim-Il-Sung, Supreme Commander of the Peoples’ Army of Korea, and General Peng Teh-Huai, Commander of the Chinese People’s Volunteer Army, to General Ridgway, Commander-in-Chief of the United Nations Forces, with a copy to the ICRC, defined as follows the North Korean and Chinese attitude to the request that ICRC delegates should be allowed to visit prisoner-of-war camps:

The decision we have taken to provide precisely, and in full detail, for the good treatment of prisoners of war is a sufficient indication of our intentions and humanitarian preoccupations and we accordingly do not see what purpose could be served by the ICRC visiting prisoner of war camps.112

The first visits to prisoner-of-war camps in South Korea took place on 26 and 29 July 1950. ICRC visits to prisoners of war continued throughout the conflict except when, in spite of the Committee’s protests, they were temporarily suspended by the UN Unified Command after serious incidents in some camps. Few relief supplies were distributed, and the number of family
messages forwarded remained insignificant because the ICRC was unable to establish relations with North Korea.

ICRC delegates could do little for civilian prisoners held in South Korean jails, but between 1950 and 1953 they paid 163 visits to prisoner-of-war camps (in the largest camps their visits lasted for eight or ten days), twenty-seven visits to prisons holding irregular combatants, one visit to a civilian internee camp, and nineteen visits to hospitals treating prisoners of war, a total of 210 visits.\textsuperscript{113}

\textit{iv) The Algerian war}

Sixty or more violent incidents in the night of 1 November 1954 marked the outset of a conflict that raged in Algeria for the next seven years.

In January 1955, seeing that unrest was spreading throughout the country and that more and more people were being accused of or sentenced for subversive activities, the ICRC offered its services on their behalf under Article 3 of the 1949 Conventions.

The French government accepted its offer on 2 February 1955, authorizing ICRC delegates to visit places of detention in Algeria and interview any prisoners they wished without witnesses, on condition that they enquired only into conditions of detention and not into the reasons for detention and that the ICRC’s reports would be sent only to the French government.

The first ICRC mission to Algeria from 28 February to 18 April 1955 visited forty-three places of detention. It was followed by nine more such missions, during which the delegates carried out a round of visits and distributed relief supplies and family messages. A summary report covering the various places of detention visited, which included detailed suggestions for improving the prisoners’ living conditions, was drawn up after each mission.

These activities were not without effect. In March 1958 General Salan, Commander-in-Chief of the French forces in Algeria, ordered special camps to be opened for National Liberation Army (ALN) combatants captured while bearing arms openly. Although the French government had declared that these captives were not prisoners of war, they were henceforth treated in much the same way as prisoners of war. The French authorities’ decision was of paramount importance, for it reversed their previous policy of automatically bringing to trial members of the ALN captured while bearing arms. As from November 1961 political detainees were granted special treatment.

From 1958 onwards the ICRC did similar work in aid of Algerian militants imprisoned in France.

The ICRC also sought to help French civilians and soldiers captured by the insurgents. Although it was in frequent touch with the National Liberation Front (FLN), and later on with the Provisional Government of the Algerian Republic, it was only once allowed access to prisoners in ALN hands: on 30 January 1958, on the border between Algeria and Tunisia, dele-
gates met four French soldiers who had been captured by the ALN at Sakiet Sidi Youssef. These prisoners were released on 20 October 1958.

Between February 1955 and 1 July 1962 the ICRC sent ten missions to Algeria, where they made 490 visits to prisons, screening camps, military internment camps, hospitals and other places of detention; and between 1958 and 1962 ICRC delegates made ninety-six visits to places of detention in France in which Algerian militants were imprisoned.¹¹⁴

v) The Suez conflict

As soon as fighting broke out the ICRC reminded all the belligerents of the basic principles of humanitarian law, and stressed in particular that ‘every enemy soldier, non-commissioned officer or officer surrendering, or otherwise captured, must be treated as a prisoner of war’,¹¹⁵ and sent delegates to Israel and to the Canal Zone of which British and French troops had just taken control. It was already represented in Cairo.

ICRC delegates in Israel paid regular visits to three camps and two hospitals, where there were about 5600 prisoners of war; they collected and delivered family messages, distributed relief supplies and organized the repatriation of serious casualties. In the Canal Zone ICRC delegates visited Egyptian prisoners captured by the Anglo-French expeditionary force. Its Cairo-based delegates visited Israeli prisoners captured by the Egyptian army, British and French civilian internees and stateless Jewish internees.

In all, ICRC delegates made twenty-nine visits before all prisoners were repatriated in January and February 1957.¹¹⁶

vi) The Vietnam War

The Vietnam War was the result of the festering resentment left by the Geneva agreements of 1954 that ended the Indochina War.

These agreements were doomed from the start, for there was never any true peace in South Vietnam. The internal disturbances that began in 1954 grew steadily worse, degenerating first into civil war, and then, with foreign intervention, into a full-scale international armed conflict to which – as the ICRC declared in its appeal of 11 June 1965 to all the warring parties – the whole of humanitarian law was applicable. In particular the ICRC stressed that any combatant taken prisoner while wearing a uniform or bearing an emblem clearly indicating his membership of the armed forces must not be killed, but must be treated humanely as a prisoner of war; that lists of combatants taken prisoner must be communicated without delay to the Central Tracing Agency; and that ICRC delegates must be authorized to visit prison camps.¹¹⁷

The Democratic Republic of Vietnam considered itself as the victim of an undeclared war of aggression by the United States. The Hanoi government described all its American prisoners as major criminals caught in flagrante delicto and rejected any ICRC activities on their behalf.¹¹⁸ The National
Liberation Front (Vietcong) adopted a similar position and refused all contact with the ICRC.\textsuperscript{119}

The United States and South Vietnamese governments assured the ICRC of their co-operation,\textsuperscript{120} but in fact adopted an excessively complicated system of classifying prisoners captured by their forces. This system, which was inappropriate for the realities of revolutionary war and often arbitrarily applied, seriously impeded the ICRC’s work.

For instance, lists of prisoners of war were never complete and were sent to the Central Tracing Agency only after long delays. Admittedly, ICRC delegates were allowed to visit prisoner-of-war camps and speak in private with the inmates, but their visits were too widely spaced to keep a proper check on interrogation methods and conditions of detention. And in spite of top-level representations, ICRC delegates were never allowed to speak in private with civilian detainees. This restriction made their visits to prisons and correctional institutions ineffective and prevented the ICRC from protecting the detainees there.

Nevertheless, between 1964 and 1975 ICRC delegates made 620 visits to places of detention in South Vietnam (prisoner-of-war camps and hospitals, screening centres, interrogation centres, correctional institutions and civilian prisons).

As the ICRC could do nothing to help prisoners held in North Vietnam or by the National Liberation Front, it was ill-placed to bring any pressure to bear on the South Vietnamese government and its American allies. All too often, ICRC delegates had to content themselves with reporting defects without being able to get them remedied. In the words of a former Vice-President of the International Committee, ‘the ICRC was gradually reduced to the ultimately compromising policy of maintaining only a symbolic presence in South Vietnam’.\textsuperscript{121}

Nor did the Saigon government gain anything from this state of affairs. Since there was no real inspection by an outside agency of conditions of detention in South Vietnam, its denials of critical reports were never convincing, especially after the discovery of the Con Son ‘tiger cages’. The only people who believed them were those with an axe to grind.\textsuperscript{122}

\textit{vii) South Africa and Namibia/South West Africa}

In 1964 the ICRC was authorized to visit political prisoners serving sentences in South Africa. From then on, its delegates visited them regularly, usually once a year at the Robben Island, Viktor Voerster, Pretoria and Barberton prisons where they were held. The number of prisoners met during each round of visits varied, ranging from 350 to 945. From 1976 onwards ICRC delegates were also authorized to visit prisoners being held in preventive detention under the Internal Security Amendment Act. As from 1980, they were allowed access to security detainees in Namibia, where they visited Mariental camp and several prisons housing SWAPO (South West Africa People’s Organization) militants. Relief supplies were distributed during these
visits, both in South Africa and in Namibia. The ICRC opened a delegation at Pretoria in November 1978, and at Windhoek in July 1981. It helped prisoners’ families by distributing food parcels and blankets and paying fares for family visits.

ICRC delegates also visited Angolan, Cuban and Soviet prisoners of war captured by South African forces in southern Angola and on the border between Angola and Namibia, as well as South African prisoners of war in Angola.

In spite of repeated requests, ICRC delegates were never authorized to meet persons awaiting trial, or those imprisoned under the Terrorism Act (then Section 29 of the Internal Security Amendment Act of 1982), and the South African authorities refused to allow more frequent visits. Recognizing that it would not be allowed access to all security detainees, in 1987 the International Committee decided to suspend its visits in the Republic of South Africa.

From 1964 to 1986, ICRC delegates made 271 visits to places of detention in South Africa and Namibia, and twelve visits to South African prisoners of war in Angola.123

viii) The Six-Day War and after

Shortly before the outbreak of hostilities the International Committee sent delegates to Israel and Egypt, and then to Jordan, Syria and Lebanon, so that when the crisis over the closure of the Strait of Tiran flared into armed conflict on 5 June 1967, its delegates were already on the spot.

As soon as fighting began the head of the ICRC delegation in Israel asked for authorization to visit prisoners captured by the Israeli army. He was told that he would be granted every facility as soon as the prisoners of war had been assembled in a camp. On 14 June ICRC delegates made their first visit to Atlit camp, which contained 5611 prisoners of war and 500 civilian prisoners, and visited it nine more times over the next few months. Other visits were made to hospitals where enemy wounded were receiving medical care. In accordance with the ICRC’s customary procedure, the delegates interviewed any prisoners of their choice in private, including the prisoners’ representatives; they also collected and delivered family messages, distributed relief supplies and arranged for the seriously wounded to be repatriated. After each visit, contact was taken up with the competent authorities. The delegates’ reports on their visits were communicated to the detaining power and to the prisoners’ powers of origin.

Israeli prisoners of war in Egypt, Jordan, Syria and Lebanon were visited between 13 and 23 June 1967.

Before the general repatriation of prisoners of war, which took place on 27 June 1967 between Israel and Jordan, on 17 July 1967 between Israel and Syria, on 9 August 1967 between Israel and Lebanon, and in January 1968 between Israel and Egypt, delegates made nineteen visits in Israel, four in Jordan, one in Syria, three in Lebanon and fourteen in Egypt.
The Israeli occupation of the Golan Heights, the West Bank, the Gaza Strip and Sinai was resisted by some of the population. Inevitably, this led to repressive measures, including the arrest, trial and imprisonment of many civilians. The ICRC asked to visit them, but it was not until December 1967 that its delegates were authorized to visit prisons in Israel and the occupied territories in which persons protected by the Fourth Convention were held. Systematic visits began in February 1968, and ICRC delegates subsequently made regular visits to prisons at Ashkelon, Beersheba, Damoun, Ramleh, Neve Tirza and Kfar Yona in Israel, and to prisons at Gaza, Hebron, Jenin, Jericho, Nablus, Tulkarem and Ramallah in occupied territory. The total number of detainees varied according to circumstances, but was generally between 3000 and 4000.

The visits lasted from one to three days, depending on the size of the place of detention and the number of prisoners there. During the visit the delegates met all detainees except those still under interrogation, taking the names of those to be interviewed without witnesses and noting individual requests that could be registered at once, for example those concerning families without a breadwinner, family visits and requests for news. They then spoke in private with any prisoners of their choice. These usually numbered between fifteen and sixty, according to the size of the place of detention and the problems encountered. From 1978 onwards delegates were also authorized to visit detainees under interrogation, freely and without witnesses, within fourteen days of their arrest. As agreed, the purpose of these visits was essentially to ascertain the conditions of detention and to ensure that the Fourth Convention was being observed. The delegates refused to enter into discussion about the reasons for detention, other than in exceptional cases. Each visit ended with an interview with the officer in charge of the prison, during which the delegates raised all matters within his responsibility.

After the visits, the relevant authorities were contacted with a view to improving the conditions of detention; such requests were concerned, for instance, with the situation of detainees from East Jerusalem, the status of administrative detainees, conditions of interrogation, overcrowding in prisons, food, medical care, clothing, leisure and physical exercise, family visits, and mail. Relief supplies were regularly distributed to detainees who were not receiving family parcels. The ICRC also arranged for transport by bus to enable close relatives to visit prisoners once a month.

Between 1967 and 1986, ICRC delegates made 1540 complete visits, thus about a hundred to each of the prisons in Israel and the occupied territories, as well as several hundred partial visits and over 19,600 individual visits to detainees under interrogation.

Complete statistics of interviews in private with prisoners are unfortunately not available, but a tendency towards individual treatment can be seen: in 1985 alone, delegates had 1405 interviews without witnesses with detainees under interrogation and 2993 interviews with detainees whose interrogation was finished.
The Israeli authorities’ repression of the Palestinian uprising (intifada) in the occupied territories from 1986 on led to a sharp increase in the number of arrests and the opening of new places of detention. For the International Committee this meant a greater number and frequency of visits to places of detention, especially to newly arrested prisoners: between January 1987 and December 1991 ICRC delegates made 8914 visits to detainees under interrogation.125

ix) The civil war in Nigeria

During the civil war in Nigeria the ICRC had access to secessionist prisoners of war captured by the Nigerian federal army and to government prisoners of war captured by the secessionist forces, but not to civilian prisoners on either side.

The ICRC never received complete lists of names of prisoners on either side, and as it was not informed of new captures it could not possibly keep proper records of them. Transmission of family messages was difficult because of the remoteness of villages and the mass flight of the population. General shortages and famine in the Biafra enclave obliged the ICRC to take charge of supplying food to government prisoners in secessionist hands. Its proposal that these prisoners be evacuated to a neutral country was not followed up.

On the government side, ICRC delegates made ninety-three visits to about fifteen places of detention containing 2000 to 2500 prisoners of war; on the secessionist side eighty-two visits were made to four places of detention containing 170 prisoners of war. The ICRC continued to monitor the welfare of prisoners of war after Biafra collapsed and hostilities ceased. In February 1970, its delegates visited about 1200 prisoners of war in Port Harcourt. It then had to end its mission and recall its delegates.

On 14 May 1970 the Nigerian Minister of Defence informed the International Committee that all prisoners had been released.126

x) The conflict between India and Pakistan in December 1971

The third conflict between India and Pakistan led to the dismemberment of Pakistan and the emergence of a new state, Bangladesh. On 16 December 1971 the Pakistan army capitulated in East Pakistan, plunging about 76,000 prisoners of war and some 17,000 Pakistani civilians into captivity.

As soon as fighting ceased in East Pakistan, the Indian army began transferring these prisoners to India, where they were housed in fifty camps and twenty hospitals in fourteen localities scattered through the Ganges valley. The transfer ended on 15 January 1972, but seventy-five Pakistani prisoners of war and nearly 2500 Pakistani civilian internees were left behind in Bangladesh. In West Pakistan there were 657 Indian prisoners of war and 270 Indian civilian internees, as well as almost 120,000 persons of Bengali origin of whom over 50,000 were interned.
When the fighting broke out the ICRC delegates posted in Islamabad, New Delhi and Dacca immediately requested permission to visit prisoners on both sides, but access was granted only when active fighting was over.

In Bangladesh, the delegates were authorized to visit the Pakistani prisoners of war and civilian internees awaiting transfer to India. They visited transit camps at Dacca, Chittagong and Sylhet and distributed essentials such as clothing, blankets, food and cooking utensils to the many Pakistani civilians, most of them destitute women and children, who had taken refuge in the camps.

After the huge mass of Pakistani prisoners of war and civilian internees had been transferred to India, the Bangladesh authorities reported that they had come across a few dozen Pakistani prisoners of war still held in various prisons. These men were grouped together at the Central Jail in Dacca and regularly visited by ICRC delegates until their repatriation. The delegates also made regular visits to two camps housing Pakistani civilian internees, who were repatriated in September 1973.

In India, the delegates’ request for permission to visit all Pakistani prisoners captured on either front was granted on 4 February 1972. Their first round of visits began on 8 February and ended on 22 April 1972. From then on they generally made a round of visits every three months (four visits a year to each place of detention), concentrating as usual on living conditions there. They paid special attention to repatriating seriously wounded prisoners, forwarded family messages and parcels prepared by the prisoners’ families and the Pakistan Red Cross Society, and launched a relief operation in aid of civilian internees, especially children.

From March 1972 tension progressively built up as captivity dragged on. There were several serious incidents, and dozens of prisoners of war met their death in riots and escape attempts. ICRC delegates visited the camp after each incident, took down firsthand accounts from prisoners and statements by the detaining authorities, and asked the detaining power to conduct enquiries in accordance with Article 121 of the Third Convention.

ICRC delegates in Pakistan made similar visits to Indian prisoners of war and civilian internees, and to the ‘repatriation centres’ where about 54,000 Bengalis (military personnel and their families, or former civil servants) were interned.

The ICRC delegates continued their visits until all the prisoners had been repatriated under the New Delhi agreement of 28 August 1973. From December 1971 until the repatriation operations ended in July 1974, the delegates paid 199 visits to places of detention in Bangladesh, 442 in India, and 149 in Pakistan, in all 790 visits. A report was drawn up on each visit and sent to the detaining power and to the power of origin of the prisoners.127

xi) The Yom Kippur War

Nine thousand Egyptian, Syrian and Israeli soldiers were taken prisoner in the Arab-Israeli conflict of October 1973. All three states were bound by the
Third Geneva Convention, so there should have been no problem in applying it. Instead, its application was made to depend on whether the Fourth Geneva Convention was applicable, a question unresolved since June 1967.

When hostilities were resumed on 6 October 1973 the ICRC delegates stationed in Tel Aviv, Cairo and Damascus asked for lists of the prisoners of war captured on either side, and for permission to visit them.

In Israel the first lists were handed to the ICRC delegation on 10 October and delegates were granted access without delay to wounded prisoners in hospital. Their first visit to able-bodied prisoners took place on 19 October. These visits continued at regular intervals until the prisoners were repatriated.

In Egypt the ICRC delegates were informed of the capture of fifty-one wounded Israeli prisoners of war and were allowed to meet them, but received the list of able-bodied Israeli prisoners only on 14 November, following the first Israeli-Egyptian agreement. Their first visit took place the following day, which was also the day on which repatriation began.

Between 15 and 22 November 1973 the International Committee repatriated 8300 Egyptian and 241 Israeli prisoners of war in four planes made available to it by the Swiss Confederation.

The Syrian government, on the grounds that Israel did not recognize the applicability of the Fourth Convention to the territories occupied in June 1967, refused to inform the ICRC of the number and identity of Israeli prisoners captured by its forces and prevented ICRC delegates from visiting them. This was a violation of Article 126 of the Third Convention and led to fears for the prisoners’ safety. The Israeli government’s riposte was to prevent ICRC delegates from entering the Syrian territory it had just occupied, on the grounds that the Syrian government was not respecting the Third Convention. In this dispute both the Israeli and the Syrian governments were violating the Geneva Conventions, and in particular the provisions banning reprisals. The result was a deadlock which the International Committee tried in vain to overcome.

It was not until 28 February 1974 – following political negotiations conducted by Secretary of State Henry Kissinger – that the Syrian government handed over a list of the sixty-eight Israeli prisoners of war held in Syria. The first ICRC visit to these prisoners took place on 1 March, and the ICRC delegates based in Israel were authorized to enter the newly occupied Syrian territories immediately afterwards. The sixty-eight Israeli prisoners of war held in Syria and the 392 Syrian prisoners of war held in Israel were repatriated by the ICRC in two operations, on 1 and 6 June 1974.128

xii) The Nicaraguan civil war

The long history of unrest in Nicaragua erupted into a full-scale civil war when guerrillas of the Sandinista National Liberation Front seized the National Palace in Managua, the seat of parliament, on 22 August 1978. Eleven months later, on 19 July 1979, President Somoza was overthrown,
but the Sandinista victory did not end the civil war, for a counter-revolutionary alliance carried on armed opposition with the backing of the United States and some Latin American countries.

The ICRC had been trying to come to the aid of political detainees in Nicaragua since 1959. It redoubled its efforts when hostages were taken at the National Palace, and in September 1978 requested permission to meet any person, civilian or military, arrested in connection with the events. Its visits began on 26 September 1978 and continued regularly in Managua and the provinces. At the same time it tried to help government soldiers captured by the insurgents; its first visit was at Jinotepe, where its delegates were allowed access to a group of National Guards captured by the Sandinista Front. However, from April 1979 onwards the ICRC’s activities to protect prisoners were sharply curtailed because fighting prevented its delegates from reaching many places of detention inside National Guard quarters.

During the days when the actual change of power was taking place, ICRC delegates went to the largest prisons in Managua to forestall acts of violence when detainees held by the Somoza regime were released. The prisoners held at the Central de Policía and the Carcel Modelo were thus set free under ICRC supervision, without untoward incident.

To avoid a final bloodbath when the Somoza regime collapsed, the ICRC and the Nicaraguan Red Cross set up safety zones in the main cities and towns of Nicaragua, in which groups of National Guardsmen who had laid down their arms found sanctuary with their families. On 23 July 1979, however, these soldiers were taken into custody by the new government. The International Committee then did for them what it had previously been doing for their adversaries.

Its work was concerned with the following categories of detainees:

- National Guardsmen taken prisoner when the Somoza regime fell;
- civilians accused of collaboration with the former government;
- persons arrested after the Sandinista rise to power and accused of counter-revolutionary activities.

ICRC delegates were allowed access to prisoners held by the national penitentiary service and by some police stations, but not, despite repeated representations, to detainees under interrogation who were held by the state security authorities.

Any necessary approaches were made to the authorities after each visit, and a report was sent to the government. The delegates also carried out large-scale relief programmes supplying mainly food, toilet articles, educational material and games. ICRC medical delegates gave consultations to large numbers of detainees, supplied medical, dental and laboratory requisites, and gave training courses to prison paramedical staff. The ICRC pressed for the release of sick or elderly prisoners on humanitarian grounds, and set up an assistance programme for the detainees’ families.
During the period between the taking of hostages at the National Palace and the overthrow of the Somoza regime, ICRC delegates made 111 visits to Sandinista militants in various places of detention. From the Sandinista victory to May 1990, ICRC delegates made 673 visits to opponents of the new regime held in various places of detention; they visited about 6400 detainees in August 1979, 3700 in 1983 and nearly 4000 at the end of 1986. On 17 March 1989, 1650 detainees were released, and the remainder in early 1990.\textsuperscript{129}

\textit{The civil war in El Salvador}

In October 1979 the ICRC was given permission for its delegates to visit all places of detention where combatants or civilians imprisoned in connection with the internal conflict in El Salvador were held. The first visit was made on 26 October 1979.

The government of El Salvador undertook to allow ICRC delegates to visit all places of detention under the authority of the Ministry of Justice (penitentiaries, municipal prisons and detention centres for minors), the National Guard, customs police and national police.

The ICRC was especially concerned with detainees under interrogation; its main objective was to protect them by meeting and registering them as soon as possible after their arrest. For that purpose ICRC delegates therefore made a point of visiting places of detention run by army or police security forces once or twice each week. The number of visits consequently rose steadily – from 1211 in 1981, 1296 in 1982 and 1700 in 1983, to 1866 in 1984, and so on.

Obviously, for so many visits there could not be a separate report for each, as would be the normal procedure. It was therefore agreed that the ICRC delegation would present a general report every three months to the government of El Salvador, and if any particular event so required, would hand in a note verbale immediately.

In addition, the ICRC set up a tracing service that kept in touch with the prisoners’ families and made every effort to register arrests, transfers and releases, and the delegation regularly distributed clothing, toilet articles, games and other relief items among the prisoners.

In spite of the pledges given by the government of El Salvador and repeated representations by the International Committee, ICRC delegates were often refused entry to the premises of military police or security services holding detainees under interrogation.

The ICRC was also concerned with members of government forces captured by the Farabundo Marti National Liberation Front. In summer 1982 ICRC delegates were authorized to contact the insurgents to arrange visits and promptly made nine visits between August and December to four groups of government soldiers, 244 persons in all, who were later handed over to the delegates and escorted under ICRC protection back to their barracks.
Soldiers captured later were similarly treated, the Front having decided to release them as a routine procedure. However, ICRC delegates were not allowed access to ten officers of the El Salvador army who were captured in 1983.\(^{130}\)

**xiv) The Iran-Iraq conflict**

As soon as war broke out between Iran and Iraq the International Committee offered its services to both belligerents and asked for permission for its delegates to visit prisoners of war and civilian prisoners on either side (23 September 1980). The first visit to Iranian prisoners of war in Iraq took place on 10 October, and to Iraqi prisoners in Iran on 22 October 1980.

From then on the ICRC did its utmost to ensure that its delegates made regular visits (in Iraq, monthly) to all places of detention where prisoners of war and civilian captives were held: POW camps, prisons, hospitals and elsewhere. During their visits, the delegates asked the prisoners to fill in capture cards and, unless prevented from doing so by the detaining authority, systematically noted down the identity of new prisoners. In this way they registered about 18,000 Iranian prisoners of war in Iraq and more than 45,000 Iraqi prisoners of war in Iran. The Central Tracing Agency set up a family messages service between prisoners and their families; the number of messages steadily increased with the number of captives. Over two million messages were sent in 1986 alone.

Mixed Medical Commissions consisting of two ICRC doctors and a doctor appointed by the detaining power were formed in Iran and Iraq to examine seriously sick or seriously wounded prisoners of war and decide whether they should be repatriated directly, before the end of hostilities. Between 1981 and 1989, 1139 Iranian prisoners and 1071 Iraqi prisoners were thus enabled to return home in thirty-one operations carried out under ICRC auspices, but they were only a minority of the seriously sick or seriously wounded prisoners eligible for repatriation under Articles 109 and 110 of the Third Convention. Clothing, toilet articles, educational material, books, games and other relief supplies were distributed during the ICRC delegates’ visits. As is customary, a confidential report on each visit was transmitted to the detaining power and the power of origin of the prisoners.

Since this was an international conflict between two states party to the Geneva Conventions, it was to be hoped that application of the Conventions would go smoothly. Instead, serious problems arose almost at once.

In Iran, delegates were not allowed to visit certain camps, or to meet certain categories of prisoners such as senior officers of the Iraqi army and prisoners who were nationals of countries other than Iraq. Prisoners were moreover subjected to intense ideological and political pressure to induce them to turn against their power of origin and revile its government. This pressure, which was a violation of the prisoners’ dignity, led to fierce clashes between groups of captives and between prisoners and guards.
In Iraq, ICRC delegates were not allowed to meet certain prisoners, including the Iranian Minister of Petroleum who was captured soon after the outbreak of hostilities, or members of the Iranian Red Crescent Society. For a long time Iranian civilians were treated as prisoners of war, whereas they should have been released or housed in separate internment camps.

Brutality and acts of violence, sometimes leading to the death of prisoners of war, were reported to have occurred in both countries. Furthermore, seriously wounded and sick persons who should have been repatriated were kept in captivity.

As top-level representations proved ineffective, the ICRC denounced these breaches of humanitarian law in two appeals sent on 9 May 1983 and 13 February 1984 to all states party to the Geneva Conventions.131

In Iran the ICRC had to interrupt its visits to places of detention on 27 July 1983 and on several other occasions because of the hostile attitude of the prisoners of war, who attacked the head of the ICRC delegation during one visit. They were again interrupted on 10 October 1984, after violent incidents in which six prisoners of war were killed and more than thirty-five injured while the delegates were visiting Gorgan camp. Over two years passed before the ICRC was able to resume its visits to Iraqi prisoners in Iran, but it had to suspend them soon after at the request of the Iranian authorities.

On the grounds that the ICRC had no access to most of the Iraqi prisoners of war in Iran, the Iraqi authorities barred ICRC delegates from meeting and registering Iranian prisoners of war captured after December 1986, but still allowed them to visit prisoners captured before that date.

Iraq declared that it had released all Iranian prisoners of war – except for those who refused to return to their home country – in repatriation operations that took place in August and September 1990, while Iran returned an identical number of Iraqi prisoners of war. The remaining Iraqi prisoners of war – except for those who refused to return to their home country – were repatriated in 1998, more than ten years after the end of active hostilities.

Between October 1980 and July 1990 ICRC delegates made 794 visits to Iranian prisoner-of-war camps in Iraq, and 286 visits to Iraqi prisoners in Iran.132

The Iraqi decision of December 1986 divided Iranian prisoners of war into two categories:

- those captured before December 1986 and registered by the ICRC delegation, whom ICRC delegates were allowed to meet when they visited places of detention, usually at eight-week intervals;
- prisoners captured after December 1986, to whom the delegates had no access.

Both categories of prisoners were repatriated in August and September 1990 in operations in which the International Committee took an active part. It
was then obvious that there was a world of difference between the mental and physical health of the two groups of prisoners – those whom the delegates had been allowed to meet and the others – even though the former had been in captivity much longer than the latter.\textsuperscript{133}

Ever since it began its visits to prisoner-of-war and civilian internee camps in the First World War, the International Committee has wondered what its delegates really achieve and whether they do any good. The plight of the Iranian prisoners in Iraq and the Iraqi prisoners in Iran is a moving and irrefutable answer to that question.

\textit{xv)} \textbf{The South Atlantic conflict}

The International Committee monitored the welfare of British and Argentine prisoners captured in the South Atlantic conflict.

ICRC delegates visited and registered all Argentine prisoners captured in South Georgia and in the Falkland/Malvinas Islands. Since there was no place of detention there, prisoners were speedily evacuated to Ascension Island or Montevideo (Uruguay), or direct to Argentine ports on the mainland. The delegates therefore met the prisoners on board the warships and hospital ships used to evacuate them, and spoke in private with those of their choice. All these prisoners – there were more than 11,000 after the surrender of the Argentine garrison at Port Stanley (Puerto Argentino) – were released under ICRC auspices and handed over to the Argentine authorities in May, June and July 1982.

Similarly, ICRC delegates paid three visits to a British pilot who had been picked up off the Falkland Islands by an Argentine vessel and taken to the mainland. He was released under ICRC auspices on 8 July 1982.

The precedent set in the South Atlantic conflict is significant: it was, to the best of my knowledge, the first time that ICRC delegates visited prisoners of war on the high seas before their transfer to a final place of detention on land.\textsuperscript{134}

\textit{xvi)} \textbf{The Gulf War}

The consequences of the war with Iran were far from settled when Iraq embarked on another adventure with equally disastrous repercussions.

On 2 August 1990, the Iraqi armed forces invaded Kuwait and captured the small Kuwaiti army and members of the civilian population. Kuwait was immediately annexed and became Iraq’s nineteenth province.

The reaction of the international community was instantaneous. On the same day, the United Nations Security Council condemned the invasion and demanded Iraq’s immediate withdrawal from Kuwait. It subsequently ordered first an economic embargo against Iraq and occupied Kuwait, then a naval blockade, before authorizing the use of force to oblige Iraq to withdraw.

Hostilities resumed on 17 January 1991 when a broad coalition led by the United States, Saudi Arabia, Kuwait, the United Kingdom and France
launched air strikes, which were backed up by a ground offensive as from 24 February. Active hostilities ended on 28 February with the liberation of Kuwait, the occupation of part of Iraqi territory and the capture of over 62,000 Iraqi prisoners of war.

Iraq’s military defeat led to an uprising on two fronts: Shi’ite Muslims took control of much of southern Iraq, and Kurdish insurgents took over the north and north-east. Both uprisings were harshly put down in March and April 1991.

Until 28 February 1991, the ICRC was refused access to Kuwaiti prisoners of war and civilians being held in Iraq. Its offers were flatly dismissed, the Iraqi authorities considering the situation of the inhabitants of its nineteenth province to be a strictly internal matter and claiming that all those arrested had been swiftly released. The ICRC was also refused access to foreign nationals being held in Iraq in retaliation for the embargo decreed by the Security Council; however, they were subsequently released in autumn 1990.

The ICRC’s requests for access to members of the Coalition armed forces captured by the Iraqi army were also in vain. Those prisoners – forty-seven in all – were released in the days following the cease-fire and handed over to the ICRC delegation in Baghdad, which took charge of their repatriation.

Conversely, the ICRC’s delegates were free to meet the Iraqi prisoners captured by the Coalition armed forces, to register them and to speak in private with the prisoners of their choice. Although an agreement was quickly reached on the repatriation of the Iraqi prisoners of war, most of those captured after the cease-fire did not wish to return home and chose to remain in camps in Saudi Arabia. The others were released and repatriated in March and April 1991.

After the cease-fire, the ICRC was also granted access to the Kuwaiti prisoners of war and civilians being held in Iraq. In spite of the Shi’ite and Kurdish uprisings, ICRC delegates were able to meet those captives in their places of detention, to register them and to make preparations for their repatriation.

At the same time, the delegates made every effort to see all people who had been arrested in Kuwait after its liberation and accused of having collaborated with the Iraqi occupiers. Thanks to the vigorous intervention of the ICRC delegation, the detainees’ conditions of detention were improved in many ways. The delegation’s work was nevertheless hampered by the chaos that reigned in post-liberation Kuwait, under cover of which countless factions opened parallel centres of detention that were largely outside the control of the Kuwaiti authorities.

Last but not least, ICRC delegates had access to members of the Iraqi armed forces captured by the insurgent Kurds. In the course of sixteen visits to thirteen places of detention, they saw several hundred Iraqi soldiers and officers and spoke freely with the prisoners of their choice. The delegates were refused access, however, to the Kurdish and Shi’ite insurgents captured by government forces.
In all, the ICRC conducted sixty-one visits in Iraq, forty-two in Saudi Arabia and over 600 in Kuwait. Yet these figures in no way reflect the true extent of its delegations’ activities, in particular the delegation in Riyadh. The ICRC delegates based in Saudi Arabia were in fact present almost every day in the camps for Iraqi prisoners of war captured by the Coalition, but as the main purpose of those visits was to register the prisoners, to make sure they wished to be repatriated and to prepare their repatriation, they did not constitute detailed visits as described in this chapter; they were moreover never included in ICRC statistics, as their objective was limited and very specific.135

10. Conclusions

The International Committee’s statistics are an historian’s nightmare, for except in financial matters the Committee is surprisingly unsystematic in presenting its data. Whenever an operation extends over several years one can be sure that the Annual Report for the first year will show the number of visits made, for the second year the number of places of detention visited, and for the third year the number of prisoners visited, so that there is no way of integrating these figures over time.

With the invaluable help of the Protection Division, it has nevertheless been possible to establish with reasonable accuracy that between 1946 and 1991, in the armed conflicts that broke out after the Second World War, ICRC delegates made over 15,000 visits to places of detention. This figure does not include:

- the 5000 or so visits made to German and Japanese prisoners of war after the end of the Second World War;
- visits made during internal disturbances or tension, as in Greece after the coup of 21 April 1967 and in Chile after the coup of 11 September 1973;
- the 28,532 individual visits to prisoners under interrogation in Israel and the occupied territories, or the 16,223 visits in El Salvador from 1979 to 1990, for these followed a simplified procedure not entirely identical with that described above.

Counting these simplified visits, ICRC delegates have made over 50,000 visits to places of detention in armed conflicts since the Second World War. These figures are significant for three reasons:

a) Visits have become more numerous and more frequent. The ICRC has not merely sent its delegates to visit the main camps at fairly long intervals; it has done its utmost to ensure that they visit all places of detention of prisoners of war and civilians often enough to keep an accurate check on the number, identity and living conditions of the people held there.
b) The ICRC has been increasingly concerned with the situation of individual prisoners. Delegates no longer confine themselves to assessing a community’s living conditions; they now also lend an ear to all the personal requests that come within the International Committee’s scope, such as the repatriation of seriously sick and seriously wounded prisoners during hostilities and requests for release on humanitarian grounds, for relatives to be traced, for family news and for aid to prisoners’ families. This expansion of the Committee’s activities means more delegates, longer visits and above all more interviews without witnesses, because the aim is no longer only to meet prisoners’ representatives but also to give every prisoner who wants to talk to the delegate about his or her personal situation a chance to do so. This also entails more administrative work after the visit, because the countless private requests made in interviews without witnesses have to be followed up.

c) Lastly – and this must not be forgotten – these figures show the number of visits that ICRC delegates have actually been able to make. They say nothing of the all too many occasions when those delegates have been denied access by the belligerents to the prisoners in their power. The results the ICRC has achieved should not lead people to overlook the obstacles placed in its way, or the circumstances that have sometimes prevented it from carrying out its mandate.

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The general public tends to assume that the very presence of the ICRC in a country is a guarantee that the situation of prisoners there is relatively satisfactory – as if the mere presence of a doctor at the bedside of a patient ensured recovery to quote the International Committee.136

It is perfectly true that when ICRC delegates are given permission to visit a prison or other place of detention, this does not mean that living conditions there will automatically become bearable or will improve. Delegates have sometimes discovered outrageous situations of which the detaining authority makes no secret. More often, attempts are made to hide shortcomings instead of correcting them, or delegates observe the same inadequacies time and time again because either the will or the means to remedy them are lacking.

Nevertheless, in the large majority of cases, merely by allowing the ICRC into its prisons a government shows that it wants to improve the situation of the people held there by applying the humanitarian principles. As innumerable prisoners past and present bear witness, visits by neutral observers are thus the best way to prevent abuse, defuse tension and improve prisoners’ living conditions. To prisoners they are, more than anything else, an opportunity of escaping from a constrictive and inevitably unequal relationship with the detaining authority. They give them the chance of another form of dialogue. They open a window on the outside world, on life and freedom. They
are a ray of light in the darkness of captivity, a breath of fresh air in the stifling atmosphere of the cells.

From this point of view, it does matter that prison doors and camp gates opened more than 50,000 times in the years that followed the Second World War to admit a neutral, considerate and benevolent visitor.

Notes
2 For further information see Book I, Chapter V, section 4, above, pp. 90–6.
3 For further information see Book I, Chapter VI, section 3, above, pp. 121–5.
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Conférence internationale de la Croix-Rouge, Stockholm, août 1948, Résumé des débats des sous-commissions de la Commission juridique, p. 84; Revised and New Draft Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Red Cross Conference, revised translation, p. 158; Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals Submitted by the International Committee of the Red Cross, p. 84; Final Record 1949, vol. I, pp. 137–8 and 327; vol. II-A, pp. 690, 792, 800, 811, 846 and 872; vol. II-B, pp. 156, 206 and 466.


8 Emphasis added.

9 As regards civilian prisoners, see Articles 28, 40, 83 and 95 of the Fourth Convention.

10 One cannot too strongly condemn the attitude of some institutions and all too many journalists who irresponsibly agree to meet prisoners and to publish information or reports on their living conditions, without insisting on having access to all prisoners, speaking in private with any they choose, and making return visits.

They should realize that by agreeing to meet prisoners without such guarantees they are jeopardizing the work of humanitarian institutions such as the ICRC, and in most cases merely countenancing a gross pretence of humanitarianism that enables the detaining authorities to collar a good conduct certificate for putting forward a few carefully conditioned prisoners to say under duress what they have been told to say. If any prisoner fails to conform, chance visitors of this kind can do nothing to save him from retaliation.

Those lending themselves to such duplicity are in effect, consciously or otherwise, accomplices in the brutality and violence such apparently ‘model’ places of detention usually seek to hide. Besides, anyone with common sense should know that prisoners who profess to be well content with the excellent conditions of their captivity only say so because they are forced to. The very idea of captivity is so repellent to human nature that detention of any kind can only be an almost intolerable act of violence. Put bars on the windows, and you turn even a palace into hell.

11 These operational principles are summarized in the Annual Report 1983, pp. 76–7, and in much the same terms in the subsequent Annual Reports; see for instance Annual Report 1997, pp. 8–9.

12 Some observers maintain that the status of prisoner of war is applicable only to international armed conflicts, and that combatants captured in internal conflicts cannot possibly be classed as prisoners of war.

Such claims are excessive. They are contradicted by the practice of states and must be rejected. Combatants captured in an internal conflict may be granted prisoner-of-war status either by virtue of a recognition of belligerency, or in accordance with an agreement between the parties to the conflict, or unilaterally by either party. And although the Conventions do not require belligerents to grant prisoner-of-war status or its equivalent to combatants captured in an internal conflict, there is nothing to stop them from doing so if they wish. The same applies to the status of civilian internee.


18 Document A 146 bis.
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19 Actes 1929, p. 516.
20 Ibid., pp. 545–52.
22 Committee II of the 1949 Diplomatic Conference unhesitatingly rejected an Australian proposal to delete the phrase ‘without witnesses’ in Article 126, paragraph 1, of the Third Convention (Article 116 of the draft); the preparatory work thus confirms the conclusions reached on the basis of a literal interpretation of the text. Final Record 1949, vol. II-A, pp. 302–3 and 379.
23 It is illegal for the detaining power to impose any such restriction; but if it is imposed the ICRC has to decide how to deal with the situation thus created.
24 In fact the whole purpose of the visit will often be distorted. For instance, the report on a visit made by ICRC delegates to the camps and work site at Bursa (Turkey) on 21 and 22 November 1916 states: ‘The Camp Commander appears to be well disposed towards the prisoners and speaks highly of their good conduct’ (Documents publiés à l’occasion de la guerre, twelfth series, ICRC, Geneva, March 1917, p. 19). Similarly, the report on the visit to camp no. 17 at Fukuoka, Japan, on 24 April 1944 contains the sentence: ‘To conclude, the Camp Commander has no complaint to make against the prisoners in this camp, who are, generally speaking, well treated’ (RICR, no. 306, June 1944, p. 447); and the report on the visit to camp no. 12 in Fukuoka on 25 April 1944 states that: ‘To conclude, the Camp Commander said he had no reason to complain of the prisoners’ (ibid., p. 448). It would be hard to equal such aberrations! What matters to a humanitarian institution such as the ICRC is not whether the Camp Commander has any complaints about the prisoners, but whether the prisoners themselves have any reasons to complain of their treatment. These three examples show clearly that when delegates are forbidden to converse freely with captives, they unconsciously adopt the detaining authority’s point of view.
25 The reader is strongly recommended to beware of the argument often put forward that ‘in internal conflicts the ICRC is not entitled to insist on its delegates being permitted to interview prisoners without witnesses, and must therefore give way when the detaining authority refuses to allow any such interviews.’ The conclusion does not follow from the premises; in such circumstances the ICRC is not bound to permit its delegates to visit the prisoners, so the question is not whether it can insist on any particular facility, but whether it would do better to give up its intention of visiting the camps, rather than yield to the detaining authority’s demands.
26 ‘Distinction entre les visites de lieux de détention par le CICR et les activités de l’Agence concernant des personnes privées de liberté’, ICRC note no. 9 to the Beirut delegation, 22 January 1979, ICRC Archives, file 219 (175).
30 It is impossible to quantify the primary benefit of visits to places of detention, hence the criticism sometimes levelled at the ICRC. It is easy enough to point out where it has failed, but there is no way of measuring the suffering it has prevented.
31 See Book I, Chapter V, section 4, above, pp. 90–6.
34 Information on the practice followed during the First World War will be found in the Documents publiés à l’occasion de la guerre; for the practice followed in the Second World
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For a summary of these instructions, see Manuel du délégué, second edition, ICRC, Geneva, 1972, pp. 161–6.

Article 79 of the Third Convention stipulates that prisoners of war shall freely elect by secret ballot, every six months, a prisoners' representative entrusted with representing them before the military authorities, the Protecting Power, the ICRC and any other organization which may assist them. In camps for officers the senior officer shall be recognized as the camp prisoners' representative. Article 102 of the Fourth Convention likewise stipulates that every six months and in accordance with similar conditions, civilian internees shall elect a Committee empowered to represent them.

Durand, From Sarajevo to Hiroshima, p. 448.

Third Convention, Article 126; Fourth Convention, Article 143. The Third Convention also specifies, ex abundante cautela, that delegates shall be allowed to interview without witnesses prisoners of war undergoing disciplinary or penal punishment (Articles 85, 98 and 108). The Fourth Convention lays down similar rules with regard to protected persons accused or convicted of offences (Article 76), and internees undergoing disciplinary or penal punishment (Articles 76, 125 and 126).

The ICRC does not appear to have given this important question all the attention it deserves. Consequently some of its interviews with prisoners have been completely useless, for it has happened that delegates who did not speak the language of the prisoners they met during their visit failed to identify serious abuses in the place of detention they were visiting, because the detainees they used as interpreters had been manipulated by the detaining authority. A delegate who understood the prisoners' language discovered the abuses later and managed to get them put right by making vigorous protests (Minutes of the ICRC Executive Board, 8 November 1973, pp. 4–5).

The ICRC has over the years formed a pool of seasoned delegates with a high standard of professional expertise. In my view it should systematically encourage them to extend their linguistic knowledge, and should not hesitate to pay them language allowances so that they can follow intensive courses in the countries concerned. A systematic policy of this kind would not be cheap, but the expense would be insignificant compared with the loss of credibility that such incidents as the one described above incur for the ICRC.

It is also my view that the ICRC should keep a record of persons familiar with a particular language who would be willing to act as interpreters on temporary assignments. In many countries the authorities keep lists of this kind which they make available to public services and courts. These lists are generally freely available to the public and the ICRC could therefore consult them.

The ‘four walls’ policy was devised on the basis of experience gained in a situation where delegates were authorized to visit without previous notification any place of detention, including interrogation centres and police stations, even if detainees were kept there only for a few hours. Complaints of violence inflicted in such places could then be registered and examined on the spot, and application of the policy did not conceal the most traumatic part of the prisoners' lives. The ‘four walls’ policy has proved its worth in such circumstances, but it was, I think, a mistake to believe that it could be applied to other situations where delegates did not have such freedom of action.


Relief operations for prisoners of war and civilian detainees will be dealt with in the next chapter (pp. 658–676 below).

There is no contradiction between this statement and the fact that delegates must request the permission of the detaining power in accordance with the first paragraph of both
Article 126 of the Third Convention and Article 143 of the Fourth Convention, for this provision relates to a general authorization under which visits without notice may perfectly well be made.


51 Manuel du délégué, p. 166.

52 Ibid.


54 The description that follows is based on cyclostyled document no. 793, ‘Schéma de rapport pour les visites à des prisonniers de guerre’; ICRC Report, vol. I, pp. 233–8; the Manuel du délégué, pp. 166–70; and my own experience.

55 Under heading no. 5 (number and status), references to rank must be replaced by references to the legal status of detainees, for instance ‘administrative detainees’, ‘awaiting trial’ or ‘sentenced’. If there are women and children, this should be specified. Heading no. 6 (nationality) must mention the detainees’ power of origin. Headings nos. 9, 10, 11, 12, 13, 16 and 17 (quarters, hygiene, medical care, clothing, food, canteen, leisure and physical exercise) must state what, if anything, is done to safeguard the dignity of women and preserve family life. Heading no. 14 must be adapted to take into account that civilian detainees may not be compelled to work in the same way as prisoners of war. Similarly, heading no. 20 must take into account the special characteristics of the disciplinary regulations applicable to them. Under heading no. 18 (relations with the outside world) the delegate must state whether civilian detainees are allowed visits by members of their family who are not in custody (the place in which the visits take place must be described and their frequency and duration stated. Any relief supplies that families are allowed to give the prisoners must be mentioned).

In drafting his report, the delegate must be guided by Articles 79–135 of the Fourth Convention.


57 See Book I, Chapter V, section 4, above, pp. 90–6.


59 Ibid.


61 Ibid., pp. 21–3.

62 The transfer and resultant sharing of responsibility is governed by Article 12 of the Third Convention and by Article 45 of the Fourth Convention.


64 Ibid., pp. 31–3.

65 ICRC Archives, file G 44/53.

66 ICRC Archives, files 219 (186) and 219 (186 B).

67 ICRC Archives, file 219 (206).
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73 This was the opinion expressed by the Netherlands Special Court of Cassation in its judgment of 12 January 1949 on the appeal against the judgment rendered on 4 May 1948 by the ‘S-Gravenhage Special Court against Hans Albin Rauter, Law Reports of Trials of War Criminals, vol. XIV, His Majesty’s Stationery Office, London, 1949, pp. 89–138, esp. pp. 114–18.

74 Ibid.

75 Ibid. The Supreme Court of the United States came to a similar decision in its judgment of 4 February 1946 on General Tomoyuki Yamashita, Law Reports of Trials of War Criminals, vol. IV, 1948, pp. 1–96, esp. pp. 44–9; dissenting opinion of Judge Rutledge, ibid., pp. 60–73. Until 1950 the French courts were of a similar opinion, but the French Supreme Court of Appeal (Cour de Cassation) overturned previous jurisprudence at a joint meeting of all its chambers on 26 July 1950 when, being required to give judgment on the composition of the tribunal competent to judge the appellants, Captains Hans and Seaman Schwartz, it concluded that Article 63 of the 1929 Geneva Convention was ‘undeniably applicable’, even if the accused persons were on trial for acts committed before their capture (quoted by Jean-Pierre Maunoir, La répression des crimes de guerre devant les tribunaux français et alliés, Éditions Médecine et Hygiène, Geneva, 1956, pp. 168–73).

76 For the legislative history of Article 85 of the Third Convention, see Report of the Work of the Conference of Government Experts for the Study of the Conventions for the Protection
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82 Note of 31 August 1965 from the Ministry of Foreign Affairs of the Democratic Republic of Vietnam to the ICRC, translation, reproduced in IRRC, no. 55, October 1965, pp. 527–8; ICRC Archives, file 202 (69).


85 Fourth Convention, Article 4.


87 This article also specifies that soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies; neither are bearers of despatches carrying out their mission openly. Article 30 stipulates that a spy taken in the act shall not be punished without previous trial. Article 31 prescribes that a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.


91 Figures compiled on the basis of those given in the ICRC’s Annual Reports for 1978–86 and 1989–91, under the heading ‘Israel and the occupied territories’, and in the 1987 and 1988 half-yearly reports of the ICRC delegation in Israel and the occupied territories (ICRC Archives, file 252 (171)), as the Annual Reports for those two years did not state the number of visits made.


93 Protocol I, Article 46.

94 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at The Hague, 18 October 1907, Article 17, The Laws of Armed Conflicts, pp. 941–9, esp. p. 945. It is clear from the preparatory work for the Hague Convention (V) of 18 October 1907 that Article 17 relates in particular to neutral nationals who have enlisted in a belligerent army for remuneration, The Proceedings of the Hague
95 Hence the use in the Third Convention of the phrase ‘the Power on which they depend’ to
designate the power with which the prisoners are connected, instead of the more common
phrase ‘Power of origin’, which does not cover prisoners of war who are not nationals of
the power in whose armies they were fighting. XVIIth International Conference of the Red
Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of
War Victims, p. 78; Le vie, Prisoners of War in International Armed Conflict, pp. 74–6.

96 Nevertheless, the law of neutrality rules that ‘corps of combatants cannot be formed nor
recruiting agencies opened on the territory of a neutral Power to assist the belligerents’
(Article 4 of the Hague Convention (V) of 18 October 1907). Although mercenary service
is not forbidden by international law, any state is entitled to forbid its nationals to enlist in
a foreign army. Thus, under Article 94 of the Military Penal Code of the Swiss
Confederation it is an offence punishable by imprisonment for any Swiss citizen, other
than a Swiss citizen residing in another state of which he is a national, to enter the service
of a foreign army. It might be asked whether the provisions for the maintenance of peace in
the Charter of the United Nations do not require the members of the United Nations to
pass similar legislation.

97 Resolution 2465 (XXIII) 1968, paragraph 8, Resolutions Adopted by the General
Assembly during its Twenty-third Session, 24 September–21 December 1968, General
Assembly, Official Records: Twenty-third Session, Supplement no. 18, Document A/7218,
pp. 4–6, esp. p. 5.

98 Resolution 3105 (XXVIII) 1973, paragraph 5, Resolutions Adopted by the General
Assembly during its Twenty-eighth Session, 18 September–18 December 1973, vol. I,
General Assembly, Official Records: Twenty-eighth Session, Supplement no. 30, Document
A/9030, pp. 142–3, esp. p. 143. These resolutions show clearly enough that mercenary
service is not illegal if it serves causes other than those they denounce. ‘A comic sort of
justice that has a river for its boundary! Truth on this side of the Pyrenees, error on the
other’, said Pascal (Pascal’s Pensées, translated by Martin Turnell, Harville Press, London,
1962, p. 139, para. 108).

99 For the legislative history of Article 47 see Official Records CDDH, vol. I, part I, p. 145;
vol. III, p. 192 (Article 42 quater); vol. VI, pp. 156–61 and 175–204; vol. XIV, pp. 342–4,
348, 351, 356–7, 360, 361–3, 369–70, 373–5, 377, 381 and 384; vol. XV, pp. 112–13,

100 Official Records CDDH, vol. XV, p. 455, document CDDH/407/Rev. 1, para. 27, fourth
session, Report of Committee III.

101 ICRC Archives, files 210 (71–00), 210 (71–43), 210 (71–175), 210 (71–179) and 215 (71).

102 Adopted by the General Assembly of the United Nations on 4 December 1989, Annex to
Resolution 44/34, Resolutions and Decisions adopted by the General Assembly during its

103 Article 10.3, ibid., p. 307.

104 Article 10.4, ibid.

105 ‘Les seuls traités qui compteraient sont ceux qui concluraient entre les arrière-pensées’,
Paul Valéry, Regards sur le monde actuel, Gallimard (Collections Idées), Paris, 1985,
p. 30 (first edition 1945).

106 Annual Reports, 1947–8 to 1963.


108 Ibid.

109 Monthly Reports and Final Report of the ICRC delegation for Palestine, ICRC Archives,
file G.59/IGC, file IV, box 830; Annual Report 1947–8, p. 110; Annual Report 1949,
pp. 73–4.

110 Le Comité international de la Croix-Rouge et le conflit de Corée: Recueil de documents,

111 Ibid., pp. 12–13 and p. 16.
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References


CHAPTER IV

RELIEF OPERATIONS IN AID OF PRISONERS OF WAR AND CIVILIAN DETAINEES

Imagine for a moment that you are a prisoner of war, and just ask yourself whether one or two rations a day of bread and soup, and a bed, and something to wear – in short, what are known as basic needs – are really all the care you need in an enemy country.


War begets scarcity. Crops, warehouses, plant and means of transport are damaged or destroyed by bombardment and passing armies. All available resources are diverted to the war effort, so the civilian population and the armed forces have to go without luxuries and all too often without necessities.

Countries at war do not willingly deplete their limited resources to provide for the upkeep of enemy prisoners of war and civilian internees, who are all too often blamed for the privations and bereavements endured by the public around them.

Often, therefore, people in places of detention make pressing appeals for help to visiting ICRC delegates who can see for themselves that they are in dire need. Sometimes, too, the International Committee is alerted by letters from prisoners and prisoners’ representatives, or reports from relief societies trying to help them, or even by a detaining authority’s appeal for help because it despairs of being able to fulfil its obligations to the prisoners in its hands. On the other side of the firing line the prisoners’ families, as well as charities and governments, are anxious to send relief to those who have fallen into enemy hands through bad luck or the fortunes of war.

The ICRC may be asked to send books, games and musical instruments, or the little extras that make life more bearable and captivity less harsh by reminding prisoners of home or deluding them that in some small ways they are still free. But delegates will often see that prisoners urgently need the food, clothing, blankets and medicines without which they will die.

Delegates will use their influence to persuade the detaining authority to face up to its responsibilities by remedying the shortcomings they have
reported. They do not always succeed, either because the will to improve prisoners’ conditions is lacking or simply because there are no resources to do so.

The question as to sending relief then arises: under what conditions may the ICRC and the National Red Cross and Red Crescent Societies send prisoners of war and civilians in captivity the relief supplies they need?

*De facto*, this question has cropped up repeatedly ever since the Franco-Prussian War of 1870; the Red Cross answered it by founding the International Relief Committee for Prisoners of War in Basel.1 *De jure*, however, it was not raised until just after the First Peace Conference, held in The Hague in 1899, for by an aberration of a kind not unknown in diplomatic assemblies the Conference had made assistance to prisoners of war the responsibility of relief societies that did not exist. After a long debate that occupied the attention of three international conferences – those of St Petersburg (1902), London (1907) and Washington (1912) – the Red Cross decided to take on the work assigned to the phantom societies. As it was unlikely that National Society officials from an enemy state would readily be allowed to enter a belligerent's territory to distribute relief supplies to prisoners of war there of their own nationality, it was agreed that such distributions should be made by the delegates of the International Committee.2 Such was the intention of Resolution VI of the Washington Conference.3

This procedure was used only to a very limited extent in the First World War, since most of the relief supplies for prisoners of war were sent through the postal services and transport companies of neutral countries. The ICRC took little part in such work.4

Things were very different in the Second World War, in which most neutral countries were soon drawn one by one into the maelstrom and all lines of communication were destroyed. The ICRC thus had to set up an extensive supply system to deliver nearly 450,000 tonnes of food and other relief items, approximately equivalent to 90 million parcels weighing 5 kg each, to prisoner-of-war and civilian internee camps.5 To tens of thousands of prisoners, these supplies made all the difference between life and death.6

Such is the origin of several provisions in the Conventions that need to be examined before the ICRC’s relief operations for prisoners of war and civilian internees can be described.

* The power detaining prisoners of war or civilian internees is bound to provide free of charge for their maintenance and for the medical attention required by their state of health. It must give them proper accommodation, sufficient food to keep them in good health, and clothing and footwear suitable for the climate.7
So it is the duty of the detaining power to see to the maintenance of the prisoners in its hands. But relief consignments from outside are still necessary, and prisoners eagerly look forward to them even at the best of times.

Relief consignments to prisoners of war are regulated primarily by Articles 72 to 76 of the Third Convention and Annex III thereto. The general principles are laid down in the first two paragraphs of Article 72, as follows:

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Prisoners in exile far from home and in a hostile environment naturally appreciate individual relief supplies more than anything else. Nothing can take the place of parcels from a loving wife or mother which contain items she has made or selected herself. But these are not enough, for some prisoners will receive plenty of parcels and others none at all, depending on the situation of their families. Besides, forwarding and checking thousands of miscellaneous parcels is extremely difficult when prisoners are captured in tens or hundreds of thousands. Collective relief then becomes indispensable and is regulated by the aforesaid detailed provisions. In the absence of any special agreement between the powers concerned it is mandatory to apply Annex III, which is therefore not merely a set of suggestions but the general rule, fully applicable unless the belligerents agree on another procedure.

Since Article 72 states what kind of articles may be sent, these provisions primarily regulate the procedure for distribution of collective consignments. The Third Convention makes the prisoners’ representatives responsible for this; they must draw up a plan of distribution that is in accordance with the donors’ instructions.

However, these provisions cannot be considered to preclude relief operations for prisoners of war who have no prisoners’ representative, for example because they have not yet arrived in a camp or are being transferred, for the Third Convention expressly reserves the right of prisoners of war to receive collective relief before their arrival in a camp or in course of transfer, [and] the possibility of representatives of the Protecting Power, the International Committee of the Red Cross, or any other body giving assistance to prisoners which may be responsible for the forwarding of such supplies, ensuring the distribution thereof to the addressees by any other means that they may deem useful.

All relief consignments for prisoners of war are exempt from import, customs and other dues. Those sent through the post office are exempt from any
postal dues, both in the countries of origin and destination and in intermediate countries. If relief consignments intended for prisoners of war are too heavy to be sent by post, the transport cost must be borne by the detaining power in all the territories under its control. The other powers party to the Convention must bear the cost of transport in their respective territories.  

Thus the power holding prisoners of war, and countries of transit thereto, are bound to forward individual and collective relief consignments to prisoners of war free of postal and other dues.

Often, however, the necessary transport facilities will have been destroyed by military operations. In that case the Protecting Powers, the International Committee or any other organization duly approved by the parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft). For this purpose the contracting parties must endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

The detaining authority is entitled to examine consignments intended for prisoners of war, but not in conditions that expose the goods contained in them to deterioration. Consignments other than written or printed matter must be examined in the presence of the addressee, or of a fellow-prisoner duly delegated by him.

These provisions, evidently intended to confirm the right of prisoners of war to receive individual or collective relief, state the obligations that this right imposes on the detaining power and to a lesser extent on transit countries.

The activity of relief societies is regulated by Article 125 of the Third Convention:

Subject to the measures which Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times. ...

The wording of the third paragraph of this article is not particularly felicitous, but its intended meaning is sufficiently clear from the context and from
the preparatory work. Article 125 as a whole is intended to make prisoner-
of-war camps easily accessible to relief societies aiding prisoners of war, whether religious or secular, national or international. As the Convention does not restrict the number of relief societies entitled to make use of this provision, it was deemed necessary to allow the detaining power to regulate and if need be restrict their activities, so as to prevent a multiplicity of competing organizations from stepping in and possibly creating disorder and confusion. It thereupon had to be made clear that the International Committee’s special position as an organization for relief to prisoners of war has always to be recognized and respected. This obligation means that the restrictions intended for other relief societies may not be applied to the ICRC. The detaining authority could therefore never use Article 125 as an excuse to reject its aid or to restrict the rights and responsibilities assigned to the ICRC elsewhere in the Conventions for carrying out relief and, a fortiori, other operations.14

Articles 108 to 112 and Annex II of the Fourth Convention regulate, in terms practically identical with those just summarized, consignments of individual and collective relief to civilian internees. In addition, Article 76 of the Fourth Convention stipulates that persons living in occupied territory who are accused of, or sentenced for, an offence shall have the right to receive at least one relief parcel monthly. Article 38 furthermore stipulates that aliens on the territory of a party to the conflict shall be enabled to receive the individual or collective relief that may be sent to them. Since this provision is neither qualified nor the subject of any reservation, it must be understood as applying also to protected persons in confinement awaiting trial or serving a sentence.

Article 142 regulates the activities of relief societies in aid of civilians protected by the Fourth Convention. It is identical, mutatis mutandis, with the first three paragraphs of the above-mentioned Article 125 of the Third Convention.

Lastly, for relief operations not expressly mentioned in the Third or Fourth Convention the ICRC may avail itself of common Article 9/9/9/10 of the 1949 Conventions, reading as follows:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection [of the protected persons] and for their relief.15

As already pointed out,16 this article permits the ICRC to offer its services in order to undertake, subject to the consent of the parties to the conflict concerned, humanitarian activities or relief operations other than those expressly provided for in the Geneva Conventions. A belligerent could not, therefore, use this provision to prevent the ICRC from carrying out the tasks
assigned to it by the Conventions or restrict its right to bring relief to prisoners of war and civilian captives.

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With regard to non-international armed conflicts, it will be seen that Article 3 of the 1949 Conventions contains no provision relating to relief operations in aid of military or civilian prisoners. It does however state that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely [and that] the wounded and sick shall be collected and cared for.

Furthermore, it authorizes the ICRC to offer its services to the parties to such conflicts. Whether the International Committee is to be allowed to deliver relief supplies to persons taken prisoner in an internal conflict is, therefore, essentially for the belligerents to decide at their discretion. But when the parties to the conflict can no longer guarantee prisoners the humane treatment to which they are entitled and the care they need, they are no longer altogether free to reject the help of a humanitarian organization such as the ICRC.17

Article 5 of Protocol II stipulates that persons deprived of liberty ‘shall be allowed to receive individual or collective relief’. The said article does not of course oblige the detaining authority to accept services offered by the ICRC for that purpose, provided the captives are indeed receiving the relief they need. But where they are not, in my view the detaining authority is bound to permit the ICRC to give the prisoners whatever relief supplies it may have available.

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The above-mentioned provisions in the Conventions are intended to guarantee the right of prisoners of war and civilian detainees to receive the relief they need. They oblige the detaining powers and transit countries not to stand in the way of necessary relief operations, but to co-operate with them by facilitating the transport, customs clearance and distribution of relief supplies.

Yet these obligations cannot override the detaining power’s legitimate desire for security. Although the Geneva Conventions do not say so in so many words, it must always be understood that the detaining authority may legitimately object to the distribution of any article that might facilitate escapes or jeopardize the order and security of the place of detention, otherwise the detaining authority’s recognized right to examine consignments would be pointless.18 The detaining authority is not, however, entitled to object to bona fide operations for the relief of real needs.
Since the Geneva Conventions allow prisoners of war and civilian captives to receive the individual and collective relief they need, it follows that those treaties authorize the International Committee – whose special position in this respect must be recognized and respected at all times – to deliver relief to prisoners of war and civilian detainees.

The Geneva Conventions say next to nothing about the guiding principles of relief operations, but in fact the question has already been settled elsewhere: it has always been accepted that all Red Cross or Red Crescent relief operations must obey the fundamental humanitarian principles which gave rise to the organization itself.

Three of these should be cited here. They are:

a) the principle of humanity, which proclaims that the Red Cross exists to prevent and alleviate human suffering. The purpose of its relief operations will therefore be to prevent any decline in the captives’ physical and mental health, to alleviate their suffering and, wherever possible, to spare them the privations that are all too often the penalty of captivity;

b) the principle of impartiality, which requires the Red Cross to make no discrimination as to nationality, race, religious beliefs, class or political opinions, and to endeavour to relieve the suffering of individuals, being guided solely by their needs, and give priority to the most urgent cases of distress;

c) the principle of neutrality, which forbids the Red Cross to take sides in hostilities. This means that its relief operations must not benefit any person other than the victims, or affect the relative strengths of the parties to the conflict.

Evidently, the Fundamental Principles of the Red Cross and Red Crescent do not merely affirm a moral stance; they also set obligatory operational standards for every Red Cross and Red Crescent organization and especially their recognized guardian, the International Committee.

* *

The Conventions and the fundamental principles cited above will dictate how relief operations in aid of prisoners of war and civilian captives are to be conducted.

The first step is to assess needs and priorities. This assessment will be more or less detailed, depending on the urgency and size of the proposed operation, but it is always essential. A visit to the place of detention, following the ICRC’s customary procedure, will usually provide all the desired information. Where a full-scale visit is impossible, interviews with the camp commander and the prisoners’ representative, and a brief inspection of the camp premises, will provide the information needed to launch the operation (such as the number of prisoners, their living
conditions, supplies most urgently needed, available equipment and facilities for forwarding supplies). Further enquiries may be made during the operation.

This prior assessment will identify needs and priorities. Next comes the question of resources, to which there are two possible answers:

*Either*

- The ICRC has sufficient funds of its own to carry out the proposed operation.

*or*

- It will do so using resources entrusted to it for that purpose by a specific institution, usually the National Society or the government of the power of origin of the prisoners it is to help.

In the first case the ICRC has full control of the proposed operation. Provided the belligerents agree, it is free to decide on its approach and procedure so long as the fundamental humanitarian principles are respected. In the latter case the ICRC acts as trustee of the relief supplies made available to it, but the donor of these supplies remains their legal owner until they are handed over to the intended beneficiaries.

Relief operations in which the ICRC acts as trustee will be seen as visible evidence of the home country’s solicitude for the prisoners. The relief may be on a huge scale, for states and many National Societies may be able to muster much larger resources than can the International Committee. But in such operations some imbalance can hardly be avoided, as every state and National Society will want to give priority to prisoners of its own nationality; and, since the resources of states and National Societies are not all equal, some prisoners will get lots of parcels and others will feel left out.

The relief operations which the ICRC undertakes with its own funds may enable it to correct this imbalance to some extent, but its limited resources will restrict the scale of its operations. The vast majority of the relief supplies handled by the ICRC during the Second World War were forwarded and distributed by it in operations in which it acted as a trustee. Since then it has increasingly conducted relief operations with its own funds or those raised by general appeals, but has also continued to forward and distribute relief supplies entrusted to it.

As a general rule, money will be of no use to prisoners. Funds raised will therefore have to be converted into relief supplies, whenever possible bought by the Committee in the territory of the detaining power in order to avoid customs formalities and save transport costs. This procedure is explicitly provided for in the Geneva Conventions. Usually, however, the very need for the proposed relief operation will stem from shortages in the territory controlled by the detaining authority, and relief supplies will have to be imported from a neutral country or from the prisoners’ home country.

The crying need for the intended humanitarian operation may then clash with the objectives of economic warfare. Even where there is no regular block-
ade comparable to the Allied blockade of Germany, its allies and the neutral states of Europe in the two world wars, each belligerent will do its utmost to paralyse its enemy’s economic potential by blocking its sources of supply.

Each party to the conflict will then be torn between wanting to come to the aid of its nationals in enemy hands, and fear of supporting the enemy’s war economy, even minimally, by allowing the export of relief supplies to prisoners for whom that enemy is responsible. The only escape from this dilemma is through strict control of distributions, which will prove that the relief supplies are really getting to the prisoners and are not being diverted. Before the start of some relief operations the International Committee will therefore be required to certify that it can exercise effective supervision, and to give appropriate guarantees for that purpose. It cannot of course conduct any relief operation unless the belligerents so agree. It could not in any circumstances consider running a blockade, even to come to the aid of nationals of the blockading power.

Next comes the question of how relief supplies are to be forwarded. There are two possible solutions.

It is sometimes possible to take advantage of a truce or armistice to get relief supplies through the front lines, either overland or by air. Often, however, military operations or the warring parties’ intransigence will rule this out. The relief will then have to be sent via a third country. It cannot be too strongly emphasized that not only the detaining power, but also intermediate states, are bound by the Geneva Conventions to ensure the conveyance of relief consignments to prisoners of war and civilian detainees.22

But, as in the Second World War, there may no longer be any intermediate state capable of forwarding relief supplies, or all lines of communication may be cut. The ICRC overcame these difficulties at the time, with the help of the American, British and Canadian Red Cross Societies, by building up a vast logistic system comprising several seagoing vessels, warehouses, trains and convoys of lorries.23 After the war, the 1949 Diplomatic Conference eventuality took this into account: Article 75 of the Third Convention and Article 111 of the Fourth Convention authorize the Protecting Powers, the International Committee or any other organization duly approved by the warring parties to organize special means of transport to forward relief supplies to prisoners of war and civilian internees, if military operations prevent the belligerents and neutrals from fulfilling their obligations to forward such supplies. When the ICRC organizes such transports, Article 44, paragraph 3, of the First Convention permits it to use the red cross emblem to protect vessels, vehicles and aircraft chartered for the purpose.

Lines of communication with a belligerent country have hardly ever been completely severed since these provisions were adopted.24 The ICRC could therefore have confined itself to asking transit states to co-operate, but for greater speed and efficiency it has often preferred to organize special transports in accordance with Articles 75 of the Third Convention and 111 of the Fourth Convention. For example, all the relief supplies for prisoners of war
during the Arab-Israeli conflicts of 1956, 1967 and 1973 were forwarded by the ICRC either in planes chartered to repatriate serious casualties, or over-land after truces made it possible to cross the cease-fire lines.25

When relief supplies reach their destination delegates have to clear them through customs and see to it that they are allowed in free of any tax or import duty. This can raise unexpected difficulties, for with an obstinacy worthy of a better cause many customs officers often refuse to grant such exemptions.

Lastly, as the Geneva Conventions authorize the detaining power to examine relief consignments before they are handed over to prisoners, ICRC delegates have to ensure that this examination is made without unreasonable delay and that the supplies are not held up or misappropriated at this stage.

Once all this has been done, the consignments can be handed over to their addressees. This phase – distribution – is the culmination of any relief operation. Its exact procedure will depend on whether the Committee is carrying out the relief operation as a trustee or financing it from its own funds.

If it is acting as a trustee, the Geneva Conventions require the supplies, except medical supplies, to be handed over to the POW representatives or internee committees, for distribution as instructed by the donors. Medical supplies must be distributed by agreement with the senior medical officers of the camp or other place of detention, who may waive the donors’ instructions if the needs of their patients so demand.26

In relief operations financed by the ICRC with its own funds, the consignments may be distributed in any of three ways:

a) The relief supplies may be handed direct to the addressees.

b) The relief supplies may be entrusted to the prisoners’ representatives or internee committees.

c) The relief supplies may be entrusted to the detaining authority, which then becomes responsible for their distribution.

Any one of these three procedures may be used provided distribution is carried out in accordance with a plan accepted by the ICRC, that the fundamental humanitarian principles are respected, and that the prisoners are informed of the origin of the supplies distributed to them.

The ICRC wishes its delegates to take part in the distributions whenever possible, even if they are not in charge of them.

Finally, any relief operation must end with a check that the supplies have been properly distributed.27 Whether the ICRC has conducted the operation as a trustee or with its own funds, it must certainly be able to show that it has made proper use of the resources placed at its disposal, as sound management and respect for the fundamental principles require. This is usually also the sine qua non for any relief operation on behalf of prisoners, for neither the prisoners’ power of origin nor anyone else is going to hand over to the International Committee the wherewithal for such an operation unless the
Committee can guarantee that the relief sent will indeed reach the prisoners for whom it is intended.

There are generally three ways of ensuring that it does:

- The first and simplest is to require receipts. All but extremely urgent relief consignments are accompanied by a covering letter stating the number of parcels and their contents. A duplicate of this letter duly countersigned by the detaining authority and the addressee of an individual parcel, or, in the case of collective relief, by the detaining authority and the representative of the prisoners of war or internee committee, need only be returned to the ICRC to prove that the consignment has in fact reached the person(s) for whom it was intended.

- The second way is to make out distribution reports showing in particular the dates of distributions, the number of beneficiaries and the supplies received by each.

- The third way is for ICRC delegates to be invited to take part in all distributions so that they can certify that these have been properly conducted and that the supplies were indeed handed over to the persons for whom they were intended.

When delegates are themselves in charge of distributions they must make out the appropriate documents. When they are not, the captives’ representative or the detaining authority must do so.

Often, however, detaining authorities are found to be inexplicably opposed to any form of supervision, as if doubt were being cast on their own good faith. That is emphatically not so. A check on distribution is as much a part of every relief operation as distribution itself, and is usually an essential condition of the operation. It meets the donors’ legitimate wish for confirmation that the supplies did indeed reach the prisoners for whom they were intended; it is necessary to the credibility of the International Committee, which must be able to prove that the resources assigned to it were properly used; and it is in the prisoners’ interests, because it prevents loss and misappropriation. But it is also in the best interests of the detaining authority, which may – modern warfare being what it is – be accused at any moment of appropriating relief sent for the prisoners in its hands. Periodical distribution reports and regular participation by ICRC delegates in distribution operations make nonsense of such allegations. Unless the detaining authority countenances misappropriation, which will not be readily admitted, it therefore has nothing to fear and much to gain by allowing the Committee to exercise its right under the Geneva Conventions to supervise distributions of the relief supplies it has forwarded.28

But how effective is that supervision? In time of famine, could not the camp guards confiscate relief consignments, forcing the addressees to sign receipts? This question has to be asked. It may be recalled that while the ICRC was making desperate efforts to help the inmates of Nazi concentration
camps, it had to stop sending relief supplies to prisoners in Mauthausen camp for the very reason that it had heard reports of the kind.29

So in the final analysis, ICRC visits to places of detention and ICRC delegates interviewing the prisoners in private are the best means of proving beyond all doubt that relief supplies are really getting through to the people they are intended for, and that the detaining power is not availing itself of these consignments to reduce the prisoners’ meagre rations in complete disregard for the Geneva Conventions, which stipulate that: ‘Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.’30

Such is also the lesson of history. During the Second World War, in spite of the blockade and submarine warfare, the ICRC managed to forward ample relief supplies regularly to the prisoners of war and civilians in captivity whom its delegates were allowed to visit. But until the last few months of the war the Allies would not allow relief supplies to be sent to Soviet prisoners of war or inmates of Nazi concentration camps, although they were infinitely worse off than Allied prisoners of war. The reason for the Allied refusal was that the International Committee was not allowed to interview those captives without witnesses, and therefore could not guarantee that if relief shipments were sent they would not be diverted to the Nazi war economy.31

This shows the extreme naivety of proposals to redistribute duties and responsibilities within the International Red Cross and Red Crescent Movement so that the National Societies and their Federation would have the sole responsibility for all assistance operations, whereas the ICRC would be confined to what are known as ‘protection’ activities. For without visiting places of detention and interviewing prisoners in private, those institutions that would take over the relief responsibilities now assigned to the ICRC could not provide the guarantees demanded by donors, and would thus be unable to obtain the resources they would need.

Nor would the ICRC find it any easier to perform the tasks left to it. At present its relief operations are clear evidence that it is interested not only in inspecting prisoners’ living conditions, but also in actively co-operating with the detaining authorities to promote the prisoners’ welfare. If the ICRC were relieved of all responsibility for relief, it would be regarded as an inspector, and indeed as a nuisance, to be got rid of without scruples or regret. It would no longer be able to establish the relationship of trust and co-operation it needs to discharge its mandate.32 It, too, would be brought to a standstill.

Clearly, the Red Cross should not disrupt the system that has worked so well for more than half a century and separate protection from assistance, leaving protection to the International Committee and handing over assistance to the National Societies and their Federation, without jeopardizing both its ability to protect captives and its ability to come to their aid. For protection and assistance are not two different activities, but two sides of one and the same activity.
Registration of prisoners, visits to places of detention and relief operations are all closely interlinked. They are all part of a logical sequence that has developed over many years and is basically natural and inevitable.

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In theory, a visit to a place of detention does not necessarily lead to a relief operation; the prisoners may say they have all they want, and the visitor may see that they do have all they need. But only in theory. Prisoners always need something even at the best of times, if only a few small things to remind them of home. Privations that might otherwise pass unnoticed are hard to bear in captivity. Exile always has a bitter taste, and doubly so behind bars.

A relief operation is not the ultimate purpose of visits to places of detention, nor can it be; but it will usually be seen as their natural complement. The International Committee’s relief operations for prisoners of war and civilian detainees have accordingly developed on the same lines as visits to places of detention. But whereas visits follow an almost invariable pattern, every relief operation is geared to particular needs. It is therefore not possible to give a generic description of ICRC relief work, and a few inevitably summary remarks must suffice.

When they were given access to prisoners of war and civilian detainees, ICRC delegates were usually also allowed to distribute relief supplies to them. The prisoners to whom the detaining authority would not allow relief supplies to be sent were prisoners the delegates were not allowed to visit. Thus North Korea refused all relief supplies sent to prisoners of war belonging to UN Unified Command forces, and the countries which the ICRC asked to co-operate in forwarding these supplies refused to do so. Similarly, North Vietnam availed itself of its reservation to Article 85 of the Third Convention to refuse relief consignments for American prisoners of war.

In other conflicts the ICRC generally managed to carry out the relief operations it found necessary or with which it had been asked to help. Its main constraints were its limited resources and the inevitable logistic problems.

In some of these operations the ICRC acted as a trustee. For example, the ICRC delegations in New Delhi and Islamabad organized eighteen operations in 1972 and 1973, at the request of the Indian and Pakistan Red Cross Societies, to exchange parcels at Wagah, on the border half-way between Lahore and Amritsar. In the course of these operations the Indian Red Cross handed over 5200 standard parcels for Indian prisoners of war in Pakistan to the ICRC delegation based in Islamabad, and the Pakistan Red Cross handed over 393,600 parcels for Pakistani POWs and civilian internees in India to the ICRC delegation based in New Delhi. These were mainly individual parcels of clothing, underwear, sandals, toilet articles, biscuits, vitamins, cigarettes, pencils and writing paper, and to a lesser extent collective consignments of sports footwear, bales of cloth, tea and the like. The military authorities undertook to transport the parcels and deliver them to the various
camps and sections of each camp. The prisoners’ representatives in each section supervised the distributions, at which ICRC delegates were usually present, and signed receipts which were then returned to the donors.  

There have been similar operations, with the ICRC acting as a trustee, in many other conflicts since the Second World War, but never on such a large scale. On the other hand, the expansion of relief operations carried out by the ICRC with its own funds has been spectacular.

First of all, ICRC food aid has increased substantially. In most cases it is provided as a supplement to relieve the monotony of, or compensate for deficiencies in, the basic food rations supplied by the detaining authority. For instance the ICRC delegation in New Delhi, helped by the Indian Red Cross, ran a supplementary food programme from 1972 to 1974 that provided one daily unit of fresh fruit each to all Pakistani children below the age of seventeen who had been interned with their parents following the December 1971 conflict, and a daily ration of baby food to all children under five. Similarly, starting in summer 1969 the ICRC delegation in Israel and the occupied territories distributed monthly individual parcels, mainly of fresh fruit and biscuits, to all civilian prisoners who did not get relief supplies from their family. In particular circumstances, however, the ICRC has agreed to supply most of the prisoners’ food. In the Nigerian civil war, for example, the famine in the Biafra enclave was so severe that the ICRC had to provide most of the food rations for government prisoners captured by the secessionist forces. And again, in spring 1978 the Committee sent food in answer to an appeal by the Chad National Liberation Front (FROLINAT), which was at a loss to feed the government prisoners of war and civilians in its hands. But even in such situations as these the ICRC has been at pains to make clear that its assistance could only be supplementary and that the responsibility for providing food for prisoners remained that of the detaining authority.

Although the detaining power is under an obligation to supply prisoners of war and civilians in captivity with the clothing and footwear they need, delegates have often reported that captives were in rags and barefoot. Clothing, underwear, footwear, and blankets or mosquito nets according to climate therefore loom large in the ICRC’s relief operations, as do toilet articles such as towels, face-cloths, soap, toothbrushes and toothpaste, which prisoners often lack.

Quite often, an infirmary in a prisoner-of-war camp is only an empty room indistinguishable from any other except by a notice on the door. The ICRC has therefore often been asked for medical equipment, instruments for minor surgery and dentistry, medicines, vaccines, water filters, sheets and linen, and miscellaneous material for the prevention of epidemics and for first aid. However, this equipment is useless except in the hands of competent personnel. The ICRC has therefore held several training courses for medical assistants, whereas ICRC medical delegates, in addition to their normal duties when visiting places of detention, have given consultations and care to prisoners. ICRC medical assistance to prisoners, especially war invalids,
has also been extended to include the provision of spectacles, crutches, prostheses, and specialized equipment for the rehabilitation of the disabled.47

Although the ICRC is neutral in matters of religious belief, it tries to respond to the spiritual needs of prisoners as far as possible. It has often been asked to supply prisoners with prayer-books and devotional articles, and has done so with complete impartiality and without any discrimination between religions.48 At times it has even gone farther to minister to the prisoners’ spiritual needs. For example, in spring 1973 Pakistani civilians interned in Bangladesh since the conflict of December 1971 asked the ICRC, as their dearest wish, to help them build a mosque in their prison camp, which consisted of a series of disused warehouses. This request was obviously outside the Committee’s usual scope. However, the ICRC delegation in Bangladesh was carrying out a big programme to build huts and shelters for displaced persons. The delegate in charge of the programme, a trained architect, drew up plans for a mosque which met with the prisoners’ approval and could be built with local materials and those at the delegation’s disposal. The ICRC supplied the materials and the internees built a mosque in which they could meditate and follow their religious practices, sheltered from the sun and bad weather.49

Prisons are always overcrowded, and the prisoners’ days nearly always empty. Unless prisoners are compelled to work, they are defenceless against boredom and the monotony of prison life. Indoor games, musical instruments, and especially books, are always welcome. There are never enough books for those prisoners who can read. But not all of them can. In countless prisons the ICRC has therefore begun by distributing chalks and slates, pencils and notebooks, and has made arrangements for literacy courses.50 Where large numbers of young people were interned or imprisoned the ICRC has done its best to encourage the formation of school classes so that they would not be handicapped all their lives by having their schooling cut short. For instance, the ICRC delegation in Israel and the occupied territories supplied most of the equipment for several school classes which were started up in Gaza prison and were taught by fellow prisoners. Since the young pupils had no other pastimes, they made such encouraging progress that it soon became necessary to consider enabling them to take examinations as evidence of their studies, and the local authorities agreed to hold intermediate-level examinations for them. With the consent of the Egyptian and Israeli authorities and the help of UNESCO experts, it even proved possible to hold school-leaving examinations conforming to the Egyptian curriculum in force in Gaza. Examination papers were sent from Cairo in sealed parcels under the supervision of UNESCO experts, who also invigilated the examinations in prison, after which the candidates’ answers were sent to Egypt for marking and announcement of results. This enabled several hundred young Palestinians to pass the Egyptian secondary school-leaving examination (the Tawjih) in an Israeli prison.51
Physical exercise is just as essential as mental exercise. Provided there is a little free space, a football or a volley-ball and net can break the monotony of prison life by healthy exercise and an hour’s illusion of freedom.

Exile and separation put a great strain on family life, and long absence sows the seeds of uncertainty all too often ending in the break-up of the family. The ICRC has always done its utmost to preserve family unity and to restore contact, at least in the form of correspondence, between captives and their families. Here the Central Tracing Agency plays a vital part, but the Committee will often have to supply some relief items such as pens, writing paper, envelopes and aerogrammes to back up its activities.

Prisoners of war are not normally allowed family visits from the other side of the front. This restriction does not necessarily apply to civilian internees, who under Article 116 of the Fourth Convention are allowed visits from near relatives at regular intervals. In practice they are, for material reasons, often very difficult to make, especially when the family lives a long distance away from the internment camp and cannot afford the fare because the internee is the breadwinner. In such cases the ICRC has made every effort to organize collective transport, either free of charge or at very low prices. The ICRC delegation in Israel and the occupied territories appears to have been the first to do so: from July 1969 to December 1986 it chartered sixty to eighty buses a month, enabling between two and three thousand people to visit their close relatives in prison. From 1987 onwards the repressive measures taken in response to the uprising (intifada) of the population in the occupied territories led to a sharp increase in the number of passengers, which reached its peak in 1990 with a total of 131,298. By the end of 1991 more than one million passengers had used this service.52

When a breadwinner is jailed, his family may starve. Besides having to endure his own hardships, a prisoner then has the worry of seeing his family slide deeper into poverty month by month. In theory the national social welfare services should look after prisoners’ families, but the ICRC has sometimes had to assist them as well. To take only one example, during the civil war in Nicaragua (1978–90), the ICRC delegation based in Managua used to distribute standard food parcels every month to prisoners’ families.53

It would be easy, but perhaps tedious, to continue this enumeration. Imprisonment brings with it any number of hardships, so the relief operations which the ICRC may undertake to alleviate them will affect almost every aspect of prison life. The kind of relief it brings varies enormously, but there is an unquestionable consistency in the ICRC’s respect for the fundamental humanitarian principles and the procedure it follows. It is equally clear that far from keeping to a cut-and-dried model, the International Committee has endeavoured to adapt its aid to the prisoners’ humanitarian needs, and to meet those needs to the best of its ability.
Notes

1 See Book I, Chapter III, Section 4 above, pp. 32–7.
2 See Book I, Chapter IV, Sections 4 and 5, above, pp. 65–76.
3 *Neuvième Conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912, Compte rendu*, the American Red Cross, Washington, 1912, p. 318; see also above, pp. 74–5.
4 See Book I, Chapter V, Section 5, above pp. 96–8.
7 Third Convention, Articles 15, 22, 25, 26, 27, 29, 30, 31, etc.; Fourth Convention, Articles 81, 85, 89, 90, 91, 92, etc.
8 Third Convention, Article 73, paragraph 1.
9 Third Convention, Article 73 and Annex III (‘Regulations concerning collective relief’).
10 Third Convention, Article 9 of Annex III.
11 Third Convention, Article 74.
12 Third Convention, Article 75.
13 Third Convention, Article 76.
17 Of course, it is not easy to lay down *a priori* theoretical minimum standards of humane treatment, but in practice it is in most cases perfectly clear from the captives’ living conditions whether they are being treated humanely or not.
18 Third Convention, Article 76; Fourth Convention, Article 112.
21 Third Convention, Article 8 of Annex III; Fourth Convention, Article 7 of Annex II.
22 Third Convention, Articles 74 and 75; Fourth Convention, Articles 110 and 111.
24 But in the civil war in Nigeria all communications with the secessionist enclave were cut in the first few months of the conflict.
25 There are frequent references to these operations in ICRC Annual Reports, and in the *International Review of the Red Cross*; see for example Annual Report 1967, p. 7.
26 Third Convention, Article 73 and Annex III; Fourth Convention, Articles 109 and Annex II.
28 Third Convention, Article 73, paragraph 3; Fourth Convention, Article 109, paragraph 3.
30 Third Convention, Article 72, paragraph 2; Fourth Convention, Article 108, paragraph 1.
32 There is no question of advocating that the ICRC should trade relief supplies for permission to carry out ‘protection’ activities; this would obviously be contrary to the humanitarian
aims of the Red Cross. The question is one of public image and acceptability. In time of
want empty-handed visitors are not welcome.

33 The importance of such things should not be underestimated. Just imagine, for example,
how Indian prisoners used to a diet of rice and spices must have felt about the sausages and
boiled potatoes, cabbage, lentils and black bread that were the staple diet of prisoners of war
in Germany in the Second World War!


36 The great difference in the number of parcels for Indian and Pakistani prisoners respectively
reflects the difference in the number of prisoners; there were about 630 Indian prisoners of
war in Pakistan and about 90,000 Pakistani prisoners of war and civilian internees in India.

37 ICRC Archives, files 252 (66) and 252 (165).

38 ICRC Archives, file 252 (66).

39 Thus 6500 standard parcels were distributed in 1970, and 7183 in 1971; Annual Report
1970, p. 50; Annual Report 1971, p. 44.


42 Revue internationale de la Croix-Rouge, no. 603, March 1969, pp. 139–40. (The English trans-
lation of the Review does not accurately reflect the French original, which stresses this point.)

43 For example, the ICRC delegation in South Vietnam regularly distributed mosquito nets,
underwear and toilet articles to prisoners of war and civilian detainees. Annual Report 1967,
p. 25.

44 As in Chad (Annual Report 1978, p. 21) and Nicaragua (Annual Report 1979, pp. 32–3).

45 For example in Chad (Annual Report 1978, p. 21) and Nicaragua (Annual Report 1981,
p. 28).

46 Ibid.


49 Reports on the visits to Kilo Camp (Dacca) on 31 May, 27 June, 28 July and 31 August


51 The statistics for the June 1972 session were:

- First secondary class 83 candidates
- Second secondary class 82 candidates
- Idadi 24 candidates
- Tawjihi 173 candidates

Report on the visit to Gaza prison, 22nd series, 11, 12 and 14 June 1972, ICRC Archives,
file 219 (171).

52 At the end of 1991, the total number of persons transported since the beginning of this
operation came to 1,009,500 persons, according to the statistics in ICRC Annual Reports
for 1970 to 1984, Note no. 830 of 4 January 1970 from the Tel Aviv delegation to Geneva
(ICRC Archives, file 252 (171)-IX), the half-yearly reports of the delegation in Israel and the
occupied territories for 1985 and 1989 (ICRC Archives, file 252 (171), and Note
TEL92-GVA 121 of 29 July 1992 from the ICRC delegation in Tel Aviv to ICRC
Headquarters, ICRC Archives, file 280/219 (171)).

53 The number of needy families who benefited from that operation averaged around 700 in

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CHAPTER V

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE REPATRIATION OF PRISONERS

‘Freedom is one-half of life.’
From a POW’s letter,
quoted in a censorship report

1. Introduction

The confinement of prisoners of war is a safety precaution intended only to prevent enemies who have surrendered from taking up arms again against their captors. Since its purpose is neither repression nor punishment, it must end as soon as the reasons for that safety precaution cease to exist.¹ Prisoners of war must therefore be released and repatriated without delay after the cessation of hostilities, and seriously wounded and seriously sick prisoners unable to bear arms again, together with members of the medical services who are not required to look after their fellow prisoners, must be released before the end of hostilities.² The belligerents are also free to conclude agreements for the early release of prisoners of war who are elderly or are fathers of large families, or who have already endured prolonged captivity.

These principles also apply to civilian prisoners. All interned enemy nationals must be released once the reasons for their internment cease to exist, and in any case immediately after the cessation of hostilities.

It follows that prisoners of war and civilian internees, other than those who escape or die in captivity, will normally be released and repatriated during or at the end of hostilities.

When one side suffers a crushing defeat and the whole of its territory is occupied, as was the case when Germany and Japan unconditionally surrendered at the end of the Second World War, the victors can make what arrangements they like to bring home their own nationals and decide unilaterally when to repatriate enemy prisoners. In all other cases repatriation will be a bilateral process carried out jointly by the opposing parties, usually with the help of a third party.

Two questions now arise: to what extent may the International Committee offer its services to help with repatriations, and what tasks and powers does humanitarian law give it for that purpose?
Before attempting an answer, it will be useful to review the provisions of the Geneva Conventions regulating the release and repatriation of captives.

2. Legal bases for the release and repatriation of prisoners

Two situations must be considered:
- the release, admission to hospital in a neutral country, and repatriation, of prisoners during hostilities;
- the release and repatriation of prisoners at the end of hostilities.

The release, admission to hospital in a neutral country, and repatriation, of prisoners during hostilities

‘The whole duty of the soldier is to do his best to riddle enemy flesh with shreds of iron’, wrote Malraux.\(^3\) Many combatants falling into enemy hands are permanently disabled and even after they are cured will be unable to take any further part in hostilities. There is no justification whatsoever for continuing to hold them prisoner. The detaining power is none the safer for detaining them and they are a burden on health services already overstrained by the war. For reasons of humanity and in the best interests of the belligerents, these unfortunates should be returned to their own countries and their families.

This is a very ancient practice attested by innumerable cartels (agreements) between hostile powers under the Ancien Régime\(^4\) and codified by Article 6 of the Geneva Convention of 22 August 1864:

> Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.
> Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties.
> Those who, after their recovery, are recognized as being unfit for further service, shall be repatriated.
> The others may likewise be sent back, on condition that they shall not again, for the duration of hostilities, take up arms.
> Evacuation parties, and the personnel conducting them, shall be considered as being absolutely neutral.\(^5\)

On the pretext that the belligerents should have an absolute right to retain those wounded enemy servicemen whom they considered it important to have in their possession, the 1906 Diplomatic Conference decided to abolish this obligation and replace it by the completely discretionary provision in Article 2 of the Geneva Convention of 6 July 1906 that ‘the belligerents shall have authority to agree to send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners’.\(^6\)
The first few months of World War I sufficed to show how absurd this decision was. Before long the belligerents found themselves having to maintain hundreds, and later on thousands, of mutilated and disabled men whom it was inhumane and pointless to keep in captivity. As there was nothing in the 1906 Convention to provide for the release of these unfortunates, the warring parties had to conduct laborious negotiations with the help of neutral states in order to conclude bilateral agreements for the exchange of war-disabled prisoners. 7

Chastened by this experience, the Diplomatic Conference of 1929 adopted Article 68 of the Prisoner-of-War Convention, which reintroduced the earlier rule providing for the compulsory repatriation of seriously ill and seriously wounded prisoners. 8 However, in the Second World War it became difficult to apply this rule because lines of communication were totally disrupted. The Protecting Powers and the ICRC nevertheless managed to organize ten operations for the exchange of seriously sick or seriously wounded prisoners of war at the neutral ports of Smyrna, Lisbon, Göteborg and Barcelona or through Switzerland, in which 21,500 British, Italian, German, Canadian, American, French and other war-disabled, as well as several thousand medical personnel, were released during hostilities. In addition, Germany unilaterally repatriated several thousand disabled nationals of countries under German occupation. 9

The Diplomatic Conference of 1949 consequently did not hesitate to maintain the principle of compulsory repatriation for seriously sick and seriously wounded prisoners of war. It is laid down in Article 109, paragraph 1, of the Third Convention:

The Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel ....

To allow for the possibility of occupation and political upheavals caused by the war, the Conference ruled, however, that no prisoners of war eligible for repatriation under that paragraph might be repatriated against their will during hostilities. 10

Thus, the following are to be repatriated direct:

- incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished;
- wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished;
- wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished. 11

But these general principles are too vague to serve as a reliable guide for practitioners who have to choose patients for repatriation during hostilities. The Diplomatic Conference therefore supplemented them with a detailed list of
the infirmities and afflictions giving eligibility for early repatriation. As a list of this kind has to be modified at regular intervals to keep abreast of developments in weaponry and medical progress, it is given in a model agreement annexed to the Convention, instead of in the Convention itself. This Annex is not merely for guidance. Parties to conflict are empowered to make special direct repatriation agreements among themselves. If they do not do so, the Annex constitutes the ordinary law to be followed and applies automatically.

If the detaining power’s medical services were solely responsible for choosing the patients to be repatriated all these precautions might well be ineffective, and differing interpretations leading to interminable argument would hold up repatriations. The Diplomatic Conference of 1949 therefore decided to follow the practice that had proved so valuable in both world wars. It provided for Mixed Medical Commissions of three members, two of whom were to be nationals of a neutral country and the third appointed by the detaining power, to be formed to examine sick and wounded prisoners of war and decide whether they should be repatriated or not, or whether they should be referred for examination at a later date, as appropriate. The detaining power is bound to carry out the decisions of the Mixed Medical Commission within three months of being notified of them.

As these precautions are intended to ensure as far as possible that the criteria for repatriation during hostilities on the grounds of disability or sickness are uniformly applied, it was obviously preferable to make a single body responsible for appointing the neutral members of Mixed Medical Commission. In accordance with the practice followed during the Second World War, the Diplomatic Conference designated the International Committee to make these appointments, and to settle the nominees’ terms of service by agreement with the detaining power.

Needless to say, prisoners of war repatriated under these regulations may not again be employed on active military service.

It is clear from the model agreement annexed to the Third Geneva Convention that the Diplomatic Conference of 1949, following the practice adopted in both world wars, recognized only injuries leading to serious permanent disability, such as total blindness or loss of a hand or foot, as giving entitlement to direct repatriation during hostilities.

This is understandable; although the Convention strictly forbids repatriated prisoners of war to be employed on active military service, the detaining power will never willingly release prisoners who, although disabled, can still be of use to the enemy war effort, for example in a workshop or office in place of an able-bodied individual who can then be sent to the front.

It was therefore necessary to adopt severe rules limiting direct repatriation during hostilities to seriously disabled wounded. But there are always large numbers of wounded in prisoner-of-war camps who, although badly injured, do not qualify for repatriation during hostilities. Can anything be done for them?
This question arose in the First World War. The French government especially was unwilling to return disabled soldiers to Germany who could still be useful to the German army, for example in General Staff offices or depots. At the suggestion of the ICRC the Swiss Federal Council therefore offered to admit to hospital in Switzerland those wounded who did not quite qualify for repatriation during hostilities, but whose injuries made life in a prison camp almost unbearable for them. It was not unreasonably felt that for these ‘minor seriously wounded’ – a tragically inadequate term coined at the time\(^1\) – internment in a neutral country was less cruel than captivity in an enemy prison camp and more likely to lead to their recovery, whilst making it impossible for them to resume military service.\(^2\)

The Swiss Federal Council negotiated the internment and admission to hospital in Switzerland of more than 67,000 sick and wounded prisoners of war, over 25,000 of whom were still in Switzerland when the Armistice was signed on 11 November 1918.\(^3\) Denmark, Norway, Sweden and the Netherlands also agreed to take in wounded and sick prisoners and give them hospital treatment.\(^4\)

The Diplomatic Conference of 1929 did not neglect this possibility of easing the plight of disabled prisoners; besides direct repatriation during hostilities, Article 68 of the 1929 Convention on prisoners of war provides for the accommodation in a neutral country and hospital treatment there of wounded and sick prisoners who do not fully qualify for repatriation.\(^5\)

In spite of all the efforts of the International Committee, and the offers of services by the Swiss Federal Council, which again said that it was ready to receive wounded and sick prisoners for hospital treatment in Switzerland, the latter provision was never applied in the Second World War. Partly for financial reasons, the belligerents agreed to extend direct repatriation to wounded and sick prisoners eligible for admission to hospital in a neutral country.\(^6\)

The Diplomatic Conference of 1949 nevertheless retained this possibility to make life easier for wounded and sick prisoners, for its Third Convention stipulates that the parties to a conflict shall endeavour, with the co-operation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of wounded and sick prisoners of war whose recovery may be expected within one year of the date of the wound or the beginning of the illness, and of prisoners whose mental or physical health is seriously threatened by continued captivity.\(^7\)

As a general rule able-bodied prisoners are not repatriated before the end of hostilities; but in a long-drawn-out conflict the harmful effects of several years of captivity with no prospect of early release cannot be ignored.

Alarmed by the growing numbers of prisoners of war sinking into a state of depression and by the ravages of a form of neurasthenia sometimes known as the ‘barbed-wire syndrome’, the International Committee therefore proposed in its appeal of 26 April 1917 that as many prisoners as possible should be repatriated, beginning with those longest in captivity.\(^8\)
This appeal and the negotiations conducted by the ICRC and the Swiss Federal Council led to the insertion in the Franco-German agreements of 15 March and 26 April 1918 of provisions for the repatriation, irrespective of number and rank, of NCOs and soldiers aged 48 or over who had been in captivity for at least eighteen months, and of men aged over 40 who had three or more children and had been in captivity for at least eighteen months. Officers fulfilling these conditions were to be interned in Switzerland. Regrettably, the ICRC’s efforts to bring about a similar agreement in the Second World War were unsuccessful.

The Diplomatic Conference of 1949 nevertheless endorsed the possibility that the parties to the conflict might, if they so wished, conclude agreements for the direct repatriation or internment in a neutral country of able-bodied prisoners of war who had undergone a long period of captivity.

The Geneva Convention of 22 August 1864 laid down the principle that army medical personnel were exempt from capture. Under enemy occupation they were to be allowed to continue their work of attending to the wounded in their care, and were to be delivered to the outposts of their own army when their patients no longer needed them. It was indeed generally accepted that only if they were completely exempt from capture could medical personnel stay with the wounded during an enemy advance, and continue their errand of mercy unhindered.

In both world wars however, the belligerents agreed that some captured medical personnel could be retained to tend to prisoners of war of their own nationality. In some cases bilateral agreements fixed the number of doctors and nurses to be retained in proportion to the total number of prisoners.

The 1949 Geneva Conventions made similar provisions: doctors, nursing staff and military chaplains could be retained by the adverse party ‘only in so far as the state of health, the spiritual needs and the number of prisoners of war require’. All such personnel whose retention is not essential under Article 28 of the First Convention ‘shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit’.

In practice, medical personnel and chaplains who are not required to look after their companions in captivity are usually repatriated together with seriously sick and seriously wounded prisoners of war, as in both world wars.

The Geneva Conventions have thus meticulously defined the categories of prisoners of war whom the belligerents can or must repatriate direct during hostilities, or who may be admitted to hospital or interned in a neutral country. The same applies to medical personnel and chaplains. The principles that determine the situation of prisoners of war are in fact crystal clear, and the 1949 Diplomatic Conference was also able to base the rules concerning them on a long and well-established practice.

Enemy civilians are unfortunately in a worse position, for the internment of enemy nationals raises questions of principle to which contemporary international law apparently has no clear answer.
Until the end of the nineteenth century it was generally accepted that nationals of one of the parties to the conflict who were on the territory of the adverse party when hostilities began should be allowed to leave. They were given a stated time, often several weeks or months, to dispose of their property and pack their bags. This practice was apparently so well established that the 1907 Hague Conference refused to insert in the Hague Regulations a rule restricting – but by so doing implicitly legitimizing – recourse to the internment of enemy civilians.

These fond illusions vanished in August 1914. Immediately after the outbreak of war the belligerents began to intern thousands of enemy nationals – not only men of military age, but also women, children, the elderly and the infirm. From the first days of the war onwards enemy civilians were ruthlessly hunted down while trying to flee enemy territory in droves. Needless to say, it was those who were the slowest off the mark, precisely because they were the least capable of doing harm, who were arrested without knowing why, having had neither time nor leave to take their property away with them. Most of them were penniless. At the drop of a hat they were treated as criminals, and taken to concentration camps or hastily improvised centres whose equipment was rudimentary or, worse, often grossly inadequate. Here men, women and children, the sick and the infirm, people of all sorts and conditions, were herded together, all too often in lamentable overcrowding and discomfort undiminished by the passage of time. Few pitied them. Hatred and threats were their portion.

Since international law seemed unable to prevent the internment of enemy aliens, although it was recognized to be contrary to custom and even to the most firmly established legal principles, it was felt that it should at least be governed by rules to mitigate its evils.

This the International Committee attempted to do. The Draft International Convention concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in Territory occupied by it, which was approved by the Fifteenth International Conference of the Red Cross, held in Tokyo in October 1934, stipulated that the internment of enemy civilians may be ordered only for those eligible for immediate mobilization or mobilization within a year, or where the security of the detaining power so required, or the situation of the enemy civilians rendered it necessary. Civilians who did not come under any of these three headings were neither to be interned nor prevented from leaving the country.

The Tokyo Draft was never approved by a Diplomatic Conference. In the Second World War, at least in Europe and Japan, most civilians who were in enemy territory when war broke out were interned. It therefore fell to the Diplomatic Conference of 1949 to adopt rules on internment, but it did so only to the limited extent of Article 35, paragraph 1, of the Fourth Convention:

All protected persons who may desire to leave the territory [of a Party to the conflict] at the outset of or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State....
Any state is therefore entitled to prevent enemy aliens from leaving its territory if it considers their departure contrary to its national interests, and to intern them or place them in assigned residence if it considers this absolutely necessary to its security. These provisions largely leave the state of residence to make its own unilateral assessment. In practice, on the outbreak of hostilities each belligerent may be expected to order most or all enemy nationals on its territory to be interned as a precaution or for any other reason, and to release some of them later after investigating individual cases as prescribed by the Fourth Convention.

Similarly, the occupying power is entitled to place in assigned residence or intern protected persons who are in occupied territory, if it considers such measures necessary for imperative reasons of security or if they have committed offences.

The provisions for the release of internees also leave the decision to the unilateral discretion of the detaining authority, as is clear from Article 132 of the Fourth Convention:

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Apart from the bilateral agreements mentioned in the second paragraph of this article, which are generally concluded only after arduous negotiations, whether internees are released during hostilities will depend largely on the detaining authority’s goodwill. Although the relevant provisions are vaguely worded, it is to be hoped that a modicum of humanity, and above all the obvious absurdity of interning and maintaining a host of inoffensive civilians, will lead to the release of all persons who cannot enhance their home country’s economic and military potential. Once released, they will be penniless and usually without a livelihood, prey to the hostility of their erstwhile neighbours before internment. It will then be high time to repatriate them.

So although the vast majority of prisoners of war, and some civilian prisoners, will not be able to return to their home country before the end of hostilities, humanitarian law does prescribe or authorize the repatriation during hostilities, or admission to hospital in a neutral country, of various categories of captives, in particular seriously wounded or seriously sick prisoners of war, medical personnel who are not required to look after their companions in captivity, and civilian internees whose departure is not considered contrary to the national interests of the state of residence.
The above provisions are immediately applicable only in international armed conflicts. In non-international armed conflicts the only immediately applicable provisions are Article 3 common to all four 1949 Conventions and, for the states party thereto, Protocol II additional to those Conventions. Neither Article 3 nor Protocol II, however, stipulate that prisoners, whether wounded or able-bodied, must be released during hostilities. Yet the parties to a conflict are not entirely free to act as they please in that regard, for both common Article 3 and Protocol II do stipulate that persons taking no direct part in hostilities, including persons deprived of liberty, shall in all circumstances be treated humanely. Article 3 also lays down that ‘the wounded and sick shall be collected and cared for’. If, therefore, one of the warring parties cannot ensure that the prisoners in its hands are humanely treated, and especially that wounded and sick prisoners receive the care that their state of health requires, it is bound to release them.

Otherwise, it must be admitted that the parties to an internal conflict are under no obligation to set their prisoners free during hostilities. If they do so, it will be entirely at their discretion or under special agreements.

This is not a vain hope; several operations for the release of prisoners have been carried out with the International Committee’s assistance or under its auspices. The most remarkable precedent for them is undoubtedly the unilateral release of Cuban prisoners at the suggestion of Fidel Castro some months before the fall of the Batista regime. On 4 July 1958 Fidel Castro, then commanding the rebel forces in the Sierra Maestra, asked the ICRC to co-operate in handing over to the Cuban Red Cross seriously wounded members of the government forces captured by the insurgents, who could not give them the medical care they required because of measures taken by the Batista government to prevent the sending of supplies to rebel-controlled areas. The ICRC sent out two delegates, who made radio contact with the insurgents; this led to an agreement to conclude a truce. The delegates escorted a government medical convoy to the meeting place chosen by the insurgents in the Sierra Maestra. On 23 and 24 July 1958, at Las Vegas de Jibacoa, the insurgents unilaterally released fifty-seven seriously wounded prisoners and 196 other prisoners in bad health.41

There have since been similar operations in internal conflicts, especially in El Salvador, where from 1982 to 1991 the Farabundo Marti National Liberation Front regularly handed over groups of captured wounded and able-bodied government soldiers to ICRC delegates.42

Despite such precedents, whether in international or internal conflicts, most prisoners can have little hope of being released and returning home before the end of hostilities.

Release and repatriation of prisoners at the end of hostilities

Repatriation operations during hostilities allow those prisoners least able to bear captivity, especially those who are seriously wounded or seriously ill, to
return to their country and home. They are, however, a minority, and the overwhelming majority of prisoners will not be set free until the end of hostilities.

There have been long periods of history where they could not even hope for that. In the ancient world prisoners who were not put to death were usually enslaved for the rest of their lives. Only exceptionally, as when the Athenians and Lacedaemonians concluded the Peace of Nicias in 421 BC, did a negotiated peace make an exchange of prisoners possible. In the Middle Ages, the custom of ransom enabled prisoners to buy back their freedom if they could afford to do so. The fate of other prisoners depended wholly on the clemency of the victor.

Only with the emergence of the nation-state and the rise of professional armies did an exchange of prisoners of war come to be seen as a natural consequence of the restoration of peace. This rule is laid down in Article LXIII of the Treaty of Münster of 30 January 1648, which ended the Thirty Years’ War, as follows: ‘All prisoners of war shall be released on either side without payment of ransom and without any distinction or reservation....’

Thereafter that rule went unquestioned. Practically all the peace treaties signed in the eighteenth and nineteenth centuries provided for the release of prisoners of war on either side, irrespective of number and rank, and without ransom.

This rule is codified by Article 20 of the Hague Regulations of 18 October 1907, which reads: ‘After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.’

However, for this firmly established rule to be effective, peace had to be concluded without undue delay.

This did not happen at the end of the First World War. In the armistice agreements the Allies compelled the defeated countries to release all the prisoners in their hands immediately and without reciprocity, whereas the repatriation of German, Austrian, Hungarian, Bulgarian and Turkish prisoners was to be arranged only on conclusion of the peace preliminaries. There were of course no such preliminaries and the peace treaties were concluded only after interminable delays. Moreover, Article 214 of the Treaty of Versailles made the repatriation of German prisoners conditional on the entry into force of the treaty, and the peace treaties with Austria, Hungary, Bulgaria and Turkey contained similar provisions. Since the Treaty of Versailles entered into force only on 10 January 1920, as many as 425 days elapsed between the end of hostilities and the beginning of the general repatriation of prisoners of war belonging to the former Central Powers.

The Diplomatic Conference of 1929 reacted hardly at all to these circumstances. Thus Article 75, paragraph 1, of the Prisoner-of-War Code read as follows:

When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war. If it has not been possible to insert in that convention such stipulations, the
belligerents shall, nevertheless, enter into communication with each other on the question as soon as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.\textsuperscript{51}

The \textit{de facto} situation at the end of the Second World War once again foiled the legislator’s intentions, for the Allies forced Germany and Japan to surrender unconditionally and there was therefore no armistice and no peace treaty. Some states, such as France and the Soviet Union, took advantage of this to retain the prisoners in their hands for several years longer. As there was no reason to fear that hostilities would be resumed, this was a gross perversion of the purpose of war captivity. Originally a security measure, it became a disguised forced labour service foisted on former enemy soldiers as war reparations. Four years after the fighting had ceased, and at the very time when the Diplomatic Conference was meeting to revise the humanitarian rules, tens of thousands of prisoners of war were still waiting to be set free.

Deeply concerned about this situation, the 1949 Conference adopted a resolutely new provision linking the release of prisoners of war not, as previously, to a formal condition – the conclusion of a peace treaty – but to a \textit{de facto} situation, namely the end of active hostilities. Thus, Article 118, paragraph 1, of the Third Convention stipulates that: ‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.’

This wording, as clear-cut as a newly minted coin, was thought to leave no room for doubt, but before long its interpretation was the subject of dispute on two counts:

a) What is the exact meaning of the phrase ‘cessation of active hostilities’? When hostilities do not end by a capitulation making any resumption of fighting impossible, as in 1945, but by an armistice or some kind of cease-fire that either side can break at any moment, must the belligerents release prisoners of war who may take up arms again if the armistice or cease-fire does not hold?

b) What are the obligations of the detaining power if some prisoners of war do not wish to be repatriated? Must it use force to repatriate prisoners who refuse to go back to their home country?

No attempt will be made to answer these questions here. Much has already been written about them, and an in-depth analysis would be beyond the scope of the present study.\textsuperscript{52} Suffice it to say that the International Committee has always been of the opinion that Article 118 of the Third Convention links the repatriation of prisoners of war to the \textit{de facto} end of the fighting, and that therefore any armistice agreement, or any suspension of hostilities for an indefinite period, entails the obligation to release and repatriate enemy prisoners. The ICRC also considers that violence should never be used to return to their own country prisoners of war who do not wish to be repatriated. It has never taken part, or required its delegates to take part, in repatriations involving any form of compulsion.\textsuperscript{53}
As regards civilian internees, Article 133, paragraph 1, of the Fourth Convention requires that ‘internment shall cease as soon as possible after the close of hostilities’. Moreover, Article 134 stipulates that: ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.’

The aforesaid provisions are immediately applicable only to international armed conflicts. Neither Article 3 of the 1949 Geneva Conventions nor Additional Protocol II thereto prescribe how prisoners, whether combatants or non-combatants, are to be treated at the end of hostilities in non-international conflicts.

Since humanitarian law has refrained from settling this matter, it will be decided by force of arms. There are two possible situations:

- The civil war may end with the victory of the secessionist party and the war-torn state break up into two or more states which sooner or later will have to enter into a new legal relationship based on international law, in which case prisoners will be released and repatriated in accordance with the rules and procedures applicable in international armed conflicts. Both sides may therefore be expected to release and exchange their prisoners as part of the arrangements for ending the conflict.

- Alternatively, the civil war may end with the state’s unity restored, in which case the winning side will regard the treatment of the defeated party as an internal matter within the sole jurisdiction of that state. Except for any measures of clemency which it might consider advisable for the sake of national reconciliation, the winning side will probably pursue the losers with the full force of the law. Here it is immaterial whether the fortunes of war lie with the insurgents or the government. Should they win, the insurgents will represent their victory as sufficient proof of legitimacy, and find any number of provisions in the arsenal of national legislation to sentence supporters of the old order. To take only one example, Franco’s regime in Spain, which came to power through the coup d’état of July 1936, sentenced on grounds of military rebellion officers and soldiers who had continued to serve the Republic. 54

Victors are rarely inclined to mercy, especially towards their fellow-countrymen, and countless captives are therefore likely to languish in prison for long years after the fighting, serving penal sentences or held in administrative detention or for what is called ‘re-education’.

Since humanitarian law seeks to protect victims of internal conflicts throughout hostilities, should it not also try to intervene between victor and vanquished once the fighting is over, in particular to fix a deadline for the release of prisoners? So far, its efforts in that direction have been timid indeed.

Article 3 of the Geneva Conventions of 1949 simply states that: ‘Persons taking no active part in the hostilities, including members of armed forces...’
who have laid down their arms ..., shall in all circumstances be treated humanely ...'. This wording may certainly be interpreted in a variety of ways.

Article 6, paragraph 5, of Protocol II further stipulates that:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

However admirable in intention, this sentence is little more than an exhortation, and therefore of distinctly limited effect.

Article 5, paragraph 4, of Protocol II further stipulates that: 'If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.'

It is difficult to feel any enthusiasm for this rule, for, notoriously, one of the most painful after-effects of civil war is not the way in which former combatants or political prisoners are released, but that they are kept in prison for ten, fifteen or twenty years after the fighting is over. Without wishing to cast doubt on the good faith of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, there is reason to believe that the winning side will find in this rule some specious excuse for deferring the release of its prisoners indefinitely.

3. ICRC practice

Having reviewed the relevant provisions of the Conventions, we can now return to the tasks and prerogatives which humanitarian law entrusts to the ICRC in connection with the release and repatriation of prisoners of war and civilian detainees.

The Conventions do not mention the ICRC in this connection, except to state that it shall appoint the neutral members of the Mixed Medical Commissions formed to examine seriously wounded and seriously sick prisoners of war and to decide upon their repatriation during hostilities.

According to the letter of the Geneva Conventions, parties to the conflict are entitled to agree among themselves on the release and repatriation of prisoners, or to approach another intermediary for that purpose.

But the ICRC, having registered the prisoners and sent delegates to visit them, and doubtless having provided them with relief supplies, cannot simply forget about them at the time of their release. As a neutral and uniquely experienced intermediary whose impartiality is universally recognized, it can offer the warring parties invaluable help in negotiating and carrying out repatriation operations. Ever since the First World War it has moreover taken part in countless operations to repatriate prisoners of almost every nationality; in so doing it has established a tradition, perhaps even a custom, to such
good effect that states that have used its services in the past could not now challenge its competence to do such work.

To sum up, the ICRC is entitled by the Geneva Conventions, by its right of humanitarian initiative and by a long series of precedents extending over almost a hundred years to offer its services to help parties to conflict fulfil their obligation to repatriate prisoners.

There are in practice four possibilities: the ICRC may be excluded from release and repatriation operations, or may take part in them as a witness, a conciliator or an executive. Each of these will now be examined.

Exclusion of the ICRC from release and repatriation operations

The first possibility is that the ICRC may be purely and simply excluded from release and repatriation operations in that it is not asked to take any part in them, either because the belligerents have decided to deal with them on a strictly bilateral basis or have agreed to call in another intermediary.

Provided the prisoners are repatriated within the specified time limits and as prescribed by the Geneva Conventions it must be admitted that this approach conforms to the letter of the Conventions – except as regards the appointment of the neutral members of Mixed Medical Commissions – but not to their spirit.\textsuperscript{55}

This was the approach reflected in the Paris peace agreement of 27 January 1973 ending the war in Vietnam.

Under this agreement the ICRC was excluded from the operations for the repatriation of American prisoners held in North Vietnam and for the release of the Vietnamese prisoners held south of the 17th parallel. The duties normally carried out by the ICRC were entrusted to an international commission whose quadripartite composition ensured that it would remain completely ineffective.\textsuperscript{56}

As was to be expected, those provisions of the Paris agreement which related to the release of Vietnamese civilian prisoners held south of the 17th parallel were never applied.\textsuperscript{57} Nor is it surprising that more than twenty years after the end of the war the uncertain fate of the American airmen captured or missing north of the 17th parallel still rankles in relations between the United States and the Socialist Republic of Vietnam.\textsuperscript{58}

This precedent confirms \textit{a contrario} the value of a neutral intermediary, if only as a witness.

The ICRC as a witness

The parties to a conflict may agree on the principle and procedure of release and repatriation operations, but may nevertheless ask the International Committee to be present at them as a witness. The ICRC delegates will merely have to note the number, identity and state of health of the released and repatriated prisoners, confirm that the operations are carried out in an
orderly fashion without brutality or compulsion, and report on them if necessary.

Their role, although limited, is a useful one. Systematic registration of released and repatriated prisoners will go far to answer the numerous tracing requests that will certainly reach the Central Tracing Agency once the former prisoners are home again. The presence of neutral observers will obviate many future disputes as to the number, identity and health of repatriated prisoners, and perhaps persuade the parties to the conflict not to wage the propaganda wars that so often poison relations between them once the prisoners are back home.

The International Committee was requested to act essentially as a witness in the operations to repatriate the Pakistani prisoners of war and civilian internees held in India following the conflict of December 1971; they were carried out in accordance with the New Delhi Agreement of 28 August 1973, in whose conclusion the ICRC had no part. The Indian authorities ran special trains to take the prisoners from various internment camps in the valley of the Ganges to the border post at Wagah, where they handed them over to the Pakistani authorities. The role of the ICRC delegates was to inform the prisoners of the stages and procedure of repatriation; get them to fill in individual repatriation cards, designed by the Central Tracing Agency, before leaving their internment camp; escort the special trains to the border post; and in general facilitate the repatriation operations. On crossing the border each prisoner handed the ICRC delegates his or her individual repatriation card for transmission to the Central Tracing Agency, which would file it with the capture card filled in by that prisoner at the beginning of his or her captivity.

Between 28 September 1973 and 30 April 1974 ICRC delegates escorted 105 special trains, were present at the release of 72,795 Pakistani prisoners of war and 17,186 Pakistani civilian internees, and reported on each operation. A copy of their report was sent to both governments.\textsuperscript{59}

ICRC delegates were also asked to be present as witnesses at the repatriation of the Chinese and Vietnamese prisoners of war captured in the conflict of February 1979. Having agreed on the procedure in bilateral negotiations, the Chinese and Vietnamese Red Cross Societies organized the repatriation operations. These took place at the mountain pass known as the ‘Friendship Pass’, on the road between the Chinese town of Nanning and the Vietnamese town of Lang Son. The Chinese and Vietnamese armed forces provided transport and medical care. The ICRC delegates’ sole task was to be present at the operations and to note down the identity of repatriated prisoners. In five operations between 21 May and 22 June 1979, 1636 Vietnamese prisoners of war and 238 Chinese prisoners of war were repatriated.\textsuperscript{60}

In both cases the presence of the ICRC was doubtless useful but certainly not essential. There is every reason to believe that the prisoners would have been repatriated in the same way without it, for the belligerents or their National Societies had managed to re-establish direct contact and conclude repatriation agreements. Their contacts continued during the operations, so
that the detaining power handed over the prisoners to their power of origin without having recourse to an intermediary.

However, it takes little knowledge of international affairs to realize that things do not always go so smoothly. In most repatriation operations during or after active hostilities the belligerents refuse all direct contact with each other, and the help of a neutral intermediary, a ‘conciliator’, is then indispensable for dialogue to be resumed.

**The ICRC as a ‘conciliator’**

In principle, the early release during hostilities of seriously sick or seriously wounded prisoners of war, military medical personnel not needed to look after their fellow captives, and civilians whose retention is not absolutely necessary to the security of the detaining power is a unilateral obligation for each individual party to a conflict. Similarly, each party is bound to release without delay after the cessation of active hostilities all prisoners of war and civilian prisoners other than those detained in connection with a judicial prosecution or conviction.

In practice, however, most releases will be reciprocal, for no belligerent, unless compelled to release its prisoners because it has lost the war, will agree to set them free unless the adverse party does the same. Except where one of the parties to a conflict is utterly defeated and has to accept whatever terms the victor dictates, the parties will have to come to an agreement. As the principle that prisoners must be repatriated is already established by the Geneva Conventions, that agreement will be on repatriation procedure: which prisoners are to be repatriated, where, when and how.

Two nations locked in a death struggle, however, will be disinclined to parley. There will rarely be any channels of communication open between them, except a few secret ones between undercover agents.

Communications are unlikely to be any easier at the end of hostilities. Any possibility of negotiation between ex-enemies will long be blocked by the emergence of new political configurations, new states which one side or the other refuses to recognize, changes of regime, the overthrow of alliances, the arrogance of victory and the bitterness of defeat. The time is long past when the heads of two warring nations could meet for peace talks immediately after a hard-fought battle, as did the Emperors Francis Joseph and Napoleon III at Villafranca only a day or so after the bloody battle of Solferino.

The help of a third party will therefore be necessary. The ICRC has no monopoly in this respect, and the Geneva Conventions do not oblige the parties to use its good offices to repatriate the prisoners they hold. But in practice the services it can render are by no means negligible.

What often turns the scale in its favour is its tradition of neutrality, the fact that it is universally recognized as an impartial humanitarian organization, and its special status. The ICRC, although no more than an association founded by private initiative, is vested with international functions. It can
enter into relations with any group exercising de facto authority over protected persons, whatever the group’s position in terms of international law or the domestic legal system, without changing the status of the group.

The ICRC has thus been able to take up contact with belligerents who denied each other’s legal existence, without that contact being regarded as recognition in any shape or form. Renée-Marguerite Frick-Cramer made this perfectly clear with respect to the operations to repatriate prisoners that took place after the First World War. She writes:

The delegates of the International Committee established contact with all the Governments, legitimate or not, who exercised de facto authority, provided they recognized the principles on which the Committee’s work was founded: strict neutrality and equality of treatment of all parties and belligerents. Thus, the Committee’s delegates were in touch with the Moscow Government, that of Bela Kun in Hungary, of Petlioura and Skoropatski in the Ukraine, of Kurt Eisner in Munich, Denikine in Southern Russia, Koltchak and Semenov in Siberia, etc. The International Committee had a similar line of conduct in regard to Red Cross societies which were already constituted or in course of formation. They were able to act in this manner because their own institution was wholly devoid of political ties; this liberty of action enabled the Committee to take the initiative of repatriating prisoners of war on the Eastern front, and of carrying out that action on an international footing – the only possible method, under the circumstances.61

The ICRC likewise intervened between the Spanish Republic and the Burgos junta, between Nazi Germany and Gaullist France, between France and the Algerian insurgents, between Pakistan and the new state of Bangladesh, between the Arab states and Israel, and between Israel and the Palestine Liberation Organization. All these parties refused to enter into direct communication with each other. Their refusal could be overcome only by a third party able to restore dialogue by acting as a go-between without thereby entailin any form of recognition.

Moreover, the ICRC will be familiar with prisoners’ living conditions from the work of the Central Tracing Agency and its own visits to places of detention, provided the Conventions have been observed. This can be of great help in seeking a solution, for experience shows that the competent authorities often know little about the situation of the prisoners they hold, and still less about the number and situation of their own nationals in enemy hands. Uncertainty breeds distrust and bars the way to any form of compromise. To reach agreements on the release of captives, precise and reliable information will often be indispensable.

Last but not least, the ICRC is incomparably more experienced in organizing repatriation than any other organization. For almost a century it has been instrumental in the conclusion of agreements for the release and repatriation of countless groups of prisoners in practically all conflicts on all continents. Its heads of mission and delegates-general are well-versed in discreet and sensitive negotiations whose difficulty can be realized only by persons who have had to conduct negotiations between two belligerents.
The fact is that it is not enough to pass on each belligerent's proposals to the other. Each party will regard any proposal from the adverse party with the utmost suspicion, based on the erroneous assumption that 'his meat is my poison'.

A neutral intermediary cannot hope to succeed if all he does is to pass on each party’s messages to the other. He must first note each party’s position and then suggest a middle course – that third way which is very hard to find but the only one likely to lead to a compromise. Even though the International Committee is not given specific authority to submit proposals to that effect, its right of humanitarian initiative obviously entitles it to do so; and the sole purpose of its proposals will be to help the belligerents to reach an agreement on the release of prisoners.

The value of the ICRC’s universally recognized right of humanitarian initiative is unquestionably most evident in situations such as these. Experience shows that the International Committee has often managed to suggest a compromise which enabled belligerents, without losing face, to find a way out of the impasse in which their irreconcilable demands had placed them.

By helping parties to a conflict to view the question of repatriation in a humanitarian context, by setting it apart from the political and military dispute between them and proposing compromise solutions which both sides could accept, the ICRC has often paved the way for thousands of prisoners to be set free and return home.

This is therefore an essentially diplomatic task in which good offices are combined with the role of conciliator, a role which the ICRC has played in many conflicts since the First World War. Although it was mostly performed off stage and records of it, if any, are hard to trace, in some cases it was acknowledged more officially and the belligerents themselves invited the ICRC to help them find a solution.

The ICRC’s most effective intervention as a conciliator unquestionably took place during the Gulf War in early 1991. As soon as active hostilities had ended, the ICRC organized several meetings bringing together representatives of Iraq, on the one hand, and of Saudi Arabia, Kuwait, the United States, the United Kingdom and France, on the other. During these meetings, which were chaired by the ICRC Delegate-General for the Middle East and North Africa, the belligerents settled on the principles and procedure of repatriation operations. They agreed to base their discussions on the ICRC’s proposals, which were more often than not adopted with very minor changes or none at all.

Obviously, the political willingness of the belligerents to repatriate without delay all prisoners of war who wished to return home played a decisive part in the repatriation of more than 60,000 prisoners in the weeks after the fighting ceased, but the ICRC’s good offices certainly also did much to make it possible.

However, there is a difficulty in acting as a conciliator which the International Committee often has to face, but of which it does not seem to be fully aware.
It is not enough for a conciliator to be neutral and impartial; he must also be disinterested. He is there to assist the parties to work out a settlement acceptable to them. He will therefore have to endeavour to narrow the gap between them and overcome their mutual antagonism, without expressing any opinion on the attitude of either.

But the ICRC cannot wash its hands of the fate of war victims. It is often asked to act as a conciliator in various situations, especially for the release of captives, yet this role may conflict with its universally recognized role as guardian of the fundamental humanitarian principles.

For although the ICRC may well be asked to help the parties to find common ground, it is also duty-bound to remind them of the humanitarian principles applicable to the release of prisoners. These are in particular the obligation to repatriate seriously wounded and seriously sick prisoners of war after having cared for them until they are fit to travel and as soon as a road is open for their return; the obligation to release military medical personnel not needed for the care of their fellow prisoners; the obligation to release civilian internees during hostilities as soon as the reasons which necessitated their internment no longer exist; the obligation to release without delay after the cessation of active hostilities all prisoners of war and civilian detainees except those awaiting trial or serving a sentence pronounced by a court of law; and the principle that prisoners of war and civilian detainees must be released and repatriated irrespective of their number or rank, without making their release subject to political demands or any other form of benefit in return, such as the requirement of legal recognition, cession of territory or payment of ransom in cash or kind.

The International Committee’s insistence on these humanitarian principles may arouse the opposition of a party to the conflict, and may even disqualify the Committee from acting as conciliator.

This is what happened after the conflict between India and Pakistan in December 1971. The Indian government made the release of Pakistani prisoners in India conditional on Pakistan’s recognizing the new state of Bangladesh, on the grounds that the Pakistani armed forces in Eastern Pakistan had surrendered to the Joint Command of the Indian and Bangladeshi armed forces; the Pakistan government rejected this demand as totally unacceptable. The resulting deadlock prolonged the captivity of nearly 90,000 Pakistani prisoners of war and civilian internees for many months after the end of active hostilities, raising the question of respect for Article 118 of the Third Convention and Article 133 of the Fourth Convention.63

In these circumstances the ICRC was repeatedly torn between its duty to remind the parties of their obligations to repatriate prisoners without delay after the end of active hostilities, and its fear of forfeiting, in the eyes of the Indian government, its position as a neutral intermediary, thereby jeopardizing its ability to help bring about an agreement for the prisoners’ release.

The difficulty of acting as conciliator whilst upholding the fundamental humanitarian principles is not one to be overcome by cut-and-dried formulas.
In all circumstances the International Committee will do its utmost to pre-
serve its ability to discharge both functions, but there are cases in which it
can only choose between them. In such cases the ICRC should, in my view,
remember that if it does forfeit its acceptance as a conciliator there will
always be other intermediaries that will try to intervene between the belliger-
ents; but that if the ICRC ceases to demand respect for the humanitarian
principles whose guardian it is, nobody will step into its shoes. ‘If the salt
have lost his savour, wherewith shall it be salted?’

The ICRC will nevertheless do all it can to retain its freedom of action, for
if it is no longer accepted as a conciliator it will be unable to help in carrying
out operations for the release and repatriation of prisoners.
Its executive role in carrying out such operations will then be forfeited as
well.

The ICRC as an executive

Operations for the release and repatriation of prisoners always entail serious
difficulties, even when the underlying principle is not disputed. How many
prisoners are to be released? Which prisoners? Where and when are the opera-
tions to take place? Who is to provide the transport, medical care, and food?

In theory there is nothing to prevent the belligerents from settling these
matters strictly between themselves, but experience has shown that if left to
their own devices they usually fail to do so. For example, to repatriate seri-
ously wounded military personnel during hostilities it might seem that all
each side has to do is to take the enemy wounded in ambulances to a ren-
dezvous where they would be transferred to vehicles supplied by their own
country. In practice things are not so easy. First of all a truce or cease-fire has
to be arranged – no easy matter. Then a rendezvous has to be agreed on,
probably halfway between the front lines, out in that inhospitable no man’s
land raked by the fire of both parties. The road, if any, is sure to be mined
and littered with unexploded shells and wreckage of all kinds. Clearing the
road might well expose a flank to a surprise attack, and even if the road is
open neither side will want to send its precious transport, drivers and medical
personnel into what may be a trap. Clearly, an operation that by peacetime
standards looks like child’s play turns out to be fraught with difficulties that
only the help of a benevolent neutral intermediary – usually the International
Committee – can overcome.

What can the ICRC do to organize and carry out operations for the release
and repatriation of prisoners? The first task – and indeed the only task – that
the Geneva Conventions explicitly assign to it for this purpose is to appoint
the neutral members of the Mixed Medical Commissions formed to examine
seriously sick and seriously wounded prisoners of war and decide whether or
not they should be released.

These commissions must be appointed upon the outbreak of hostilities; their appointment cannot be deferred until an agreement on the repatriation
of disabled prisoners has been concluded. Yet their essential purpose is obviously to repatriate disabled prisoners during hostilities. They therefore play an executive role, even though it may precede any repatriation agreement.

Mixed Medical Commissions rendered invaluable services in both world wars, but although the Geneva Conventions explicitly state that they shall be appointed, they do not appear to have been set up since 1945. This is regrettable.

With the belligerents’ consent, the ICRC has on occasion instructed its medical delegates to do the work normally done by the neutral members of the Mixed Medical Commissions. Thus in the Palestine conflict of 1948–9, medical commissions consisting of two ICRC medical delegates and a doctor belonging to the detaining authority were formed in Egypt, Israel, Jordan and Syria.\(^\text{66}\) The same procedure was adopted in the Iran-Iraq conflict, when medical commissions of two ICRC medical delegates and one doctor belonging to the detaining authority’s medical services were formed in Iran and Iraq, and examined hundreds of wounded and sick soldiers from both sides. They met, however, with many difficulties, and not all the prisoners certified eligible for repatriation were released.\(^\text{67}\) This shows that such makeshift arrangements have their drawbacks, and that everything possible should be done to revive the practice prescribed by the Geneva Conventions, which is the one most likely to facilitate the release and repatriation of seriously wounded and seriously sick prisoners.

Except for the appointment of the neutral members of Mixed Medical Commissions, the Geneva Conventions and their Additional Protocols do not assign any specific task to the ICRC in the preparation and execution of operations for the release and repatriation of prisoners. Its possible co-operation will therefore depend almost exclusively on special agreements and informal understandings, and will be defined in accordance with the principles that govern its work. Nevertheless, the ICRC has wide experience in that field, and the tasks which may be entrusted to it will be directly connected with the difficulties encountered by the belligerents.

The most important and difficult preliminary is usually to compile and pass on lists of prisoners to be repatriated. Before any general exchange of prisoners, each belligerent will want to be sure that all its nationals will be released; and before any exchange during hostilities, that all the prisoners in the agreed categories will be released. In most cases, therefore, the absolute prerequisite for any repatriation will be an exchange of lists of prisoners that each side intends to repatriate.

As a rule, it is up to the belligerents themselves to make out the lists of prisoners to be repatriated, and the International Committee has only to pass them on. But in practice the ICRC is often required either to check that both parties’ lists include the names of all prisoners to be repatriated, or to make out the lists itself.

This will be a particularly delicate task if the prisoners have to be consulted about their repatriation. The Third Convention stipulates that no
wounded or sick prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities, and the Fourth Convention that civilian internees may be released in the territory of the detaining power if they were previously resident there, provided that power agrees. The Third Convention does not answer the difficult and hotly debated question as to whether the detaining power may legitimately grant asylum to prisoners of war who do not wish to be repatriated at the end of active hostilities.

When prisoners are entitled to object to being repatriated, it is essential to find out who is qualified to ascertain their true wishes. The Conventions give no explicit ruling on this, and it is therefore in the first place for the detaining authority to note and respect the prisoners’ wishes. But if this were left solely to the detaining power there would be every reason to fear abuse and recriminations, each party accusing the other of failing to respect the prisoners’ wishes and of forcibly retaining prisoners on the ostensible grounds that they prefer not to be repatriated. The Protecting Powers must therefore be able to exercise their right of scrutiny under common Article 8 of the Geneva Conventions, and to satisfy themselves that prisoners who object to being repatriated do so of their own free will. Where there are no Protecting Powers the parties to conflict may by mutual agreement entrust this task to an ad hoc commission of undoubted impartiality, or to the ICRC.

A similar difficulty may arise if the parties to the conflict have agreed that prisoners to be released may choose between release on the spot or release at another destination, or have the option of two different destinations. Here, too, the co-operation of a third party requested to interview the prisoners and ascertain their true wishes is decisive. The parties to the conflict can request either the Protecting Powers, or an ad hoc body of undoubted impartiality, or the International Committee to do so.

For example, in a dual exchange of letters in November 1983 between the ICRC and the state of Israel on the one hand, and between the ICRC and the Palestine Liberation Organization on the other, it was agreed that the Israeli forces would release all the prisoners they were holding in southern Lebanon, about 4400 in all, in exchange for the release of six Israeli soldiers held by the PLO in Tripoli (Lebanon). The prisoners held by the Israeli forces were given the choice between release on the spot or transfer to Algeria, the Algerian government having agreed to grant them asylum. The ICRC delegates were asked to question the latter prisoners one by one; 3300 of them chose to be released in southern Lebanon, and 1100 prisoners were transferred to Algiers in three heavy transport aircraft placed at the ICRC’s disposal by the French government for this operation.

Similarly, in the operations for the release of prisoners of war captured in the Iran-Iraq conflict of 1980–8 ICRC delegates were asked to interview all the Iranian and Iraqi prisoners individually to make sure that they were all returning to their home country of their own free will. This was especially important because both sides had subjected the prisoners to indoctrination of various kinds to induce them to speak out against the government of their
own country or even to take up arms against their homeland. So some prisoners had good reason to object to repatriation. Within only a few weeks the ICRC delegates questioned more than 37,000 Iranian prisoners and about the same number of Iraqi prisoners.73

The same thing happened after the Gulf War, in the spring of 1991. During a meeting held under ICRC auspices in Riyadh on 7 March 1991, the representatives of Iraq and those of Saudi Arabia, Kuwait, the United States, the United Kingdom and France agreed that no prisoners of war would be repatriated against their will and that any prisoners who did not wish to be repatriated would be able to say so during an interview in private with an ICRC delegate. The ICRC delegates therefore spoke individually with several thousand Kuwaiti prisoners of war and civilian internees being held in Iraq; over 6400 of them were repatriated to Kuwait. They also met almost 85,000 Iraqi prisoners of war and civilian internees being held in Saudi Arabia; about 65,000 Iraqi prisoners of war agreed to be repatriated to Iraq, but another 20,000 prisoners of war and civilian internees did not. Those who agreed were immediately repatriated; the fate of those who refused to go back to Iraq remains to be settled.74

The choice of how and where the handover is to take place will certainly be problematic, especially for a repatriation operation during hostilities. There are three possibilities:

- an operation at cease-fire lines or on the front line during a truce or cease-fire;
- an airlift;
- an operation in a third country.

It is always extremely difficult to conclude a truce, for each belligerent is afraid that the enemy will use it to resupply its outposts or launch a surprise attack. But truces do prove conclusively that some kinds of peaceful relations are possible even in war, and that humanitarian law does maintain at least a minimum of communication between belligerents. The ICRC has therefore attached the utmost importance to carrying out operations for the release of prisoners at cease-fire lines wherever possible.

For example, since 1967 the ICRC has successfully carried out many operations for the release of prisoners at cease-fire lines in the Middle East: at the Suez Canal for exchanges of prisoners between Egypt and Israel; at Rosh Hanikra/Ras Nakoura, the border post between Israel and Lebanon; at Ahmedieh on the Golan Heights, in the no man’s land between the Israeli and Syrian forces; and at the Allenby Bridge, on the cease-fire line between Israel and Jordan. For many of these operations a truce had to be concluded. In accordance with Article 44, paragraph 3, of the First Convention, the ICRC used the red cross emblem to signal the truce and protect the prisoners and its own delegates.75

Similarly, the prisoners captured in the conflict between Turkey and Cyprus in summer 1974 were released between 16 September and
28 October 1974 in fourteen successive operations, organized by the ICRC with the co-operation of the United Nations forces stationed in Cyprus. These operations were carried out on the dividing line between the Greek Cypriot and Turkish Cypriot sectors of Nicosia, in the courtyard of the Ledra Palace Hotel, the headquarters of the United Nations contingent. The approaches to the neutralized zone within which they took place were guarded by United Nations troops; in all, 5980 Greek-Cypriot, Turkish-Cypriot, Greek and Turkish prisoners were released.76

Seriously wounded and seriously sick prisoners are best repatriated by air, since this obviates the hazards of transport by ambulance and transfer to other vehicles on the cease-fire line.

When the belligerents cannot agree either to conclude a truce or to open an air corridor, the only course left is to exchange prisoners in a neutral country. Thus in the Arab-Israeli conflicts, several operations for the release of wounded or able-bodied prisoners took place in Cyprus with the co-operation of the Cypriot authorities and the Cyprus Red Cross Society.77 In two other operations at Cointrin airport, Geneva, sixty-six Arab civilian detainees and one Israeli prisoner of war were released on 14 March 1979, and three Israeli prisoners and 394 Palestinian prisoners were released on 20 May 1985.78 Similarly, in the Iran-Iraq conflict several operations for the release of war-disabled prisoners took place at Larnaca with the help of the Cypriot Red Cross Society, and at Ankara airport with the help of the Turkish Red Crescent Society.79

The choice of means of transport is no less problematic. In principle, each party to the conflict has to transport the prisoners whilst they are in the territory under its control, and provide the necessary ambulances, buses, trains, ships or aircraft. But here, too, difficulties may arise. It is often inadvisable to transfer wounded from one vehicle to another at the cease-fire lines, especially when repatriating seriously sick and seriously wounded prisoners, and they will have to travel in the same vehicles from the point of departure to the point of arrival. No belligerent will be willing to provide suitable transport into enemy territory or give permission for an enemy aircraft to overfly the territory under its own control; the necessary transport will therefore have to be provided by a third party. The ICRC will usually be asked to do this, as at the end of the Suez conflict of November 1956, when forty-eight Egyptian disabled military personnel were released by Israel and repatriated direct from Tel Aviv to Cairo on 5 and 16 December 1956 in two hospital aircraft placed at the ICRC's disposal by the Italian government.80

Again, at the end of the Six-Day War 260 seriously wounded prisoners were repatriated from Tel Aviv to Cairo or Amman in twelve operations between 15 June and the end of July 1967 in a DC4 plane placed at the ICRC's disposal by the Swiss Confederation.81 Similarly, the first repatriation of prisoners seriously wounded in the conflict between India and Pakistan of December 1971 was carried out by the ICRC on 25 February 1972 in two planes provided by the Swiss Confederation, the parties to the
conflict having insisted – in the opinion of the ICRC, an exorbitant demand – that each plane should take off and arrive at exactly the same time as the other.82

In each of these operations the International Committee provided doctors and nursing staff for the wounded and sick.

Since each belligerent wants to be perfectly sure that all the prisoners due for release – but only they – are returned to it, the ICRC will often be requested to check the number of prisoners and their identity when they board the vehicles used for their repatriation, cross the cease-fire lines, or are handed over to their own authorities. Any such request inevitably raises the tricky problem of how much responsibility the ICRC can assume, for ICRC delegates can never be sure of the captives’ identity and have to rely on the statements of the responsible authorities and of the prisoners themselves.

Modern war is such that the belligerents often refuse any direct contact with each other, even in an operation for the exchange of prisoners. Since the prisoners cannot be left to find their own way across the lines a third party, usually the International Committee, has to take temporary charge of them. Their repatriation then calls for a dual transfer – first by the detaining power to the ICRC, then by the ICRC to their power of origin. Two handover certificates have to be signed,83 the ICRC taking responsibility for the prisoners between the two operations. In this way operations for the release and repatriation of prisoners can take place between states, or organizations other than states, which will not accept any form of contact. Indeed, this is how most such operations have been carried out in the Middle East between the Arab States and Israel, or between Israel and the Palestine Liberation Organization.84

If prisoners cannot return to their country of origin without passing through other countries the International Committee may be asked to apply to the governments of the transit states for the necessary visas, and to issue travel documents to the prisoners for the journey to their home country.85

Thus, even though the Geneva Conventions and the Additional Protocols thereto do not explicitly entrust the International Committee with any definite task for the release and repatriation of prisoners of war and civilian prisoners, apart from appointing the neutral members of the mixed medical commissions, in practice it is often requested to help with the negotiations prior to repatriation and in preparing and carrying out repatriation operations.

The ICRC has accordingly taken part in operations for the release of prisoners captured in most conflicts since the Second World War:

- the Palestine conflict of 1948–9;
- the Kashmir conflict of 1948–9;
- the Suez conflict of 1956;
- the Bizerta affair of 1961
- the Irian-Jaya affair of 1962;
the civil war of 1962–7 in the Yemen;
the Six-Day War of June 1967;
the conflict between Honduras and El Salvador of 1969;
the border incidents between Saudi Arabia and Southern Yemen of 1969–70;
the conflict between India and Pakistan of December 1971 (only in the operations for the release of wounded and sick prisoners, as the ICRC acted essentially as a witness in the general repatriation of prisoners);
the Arab-Israeli conflict of October 1973;
the conflict between Turkey and Cyprus in the summer of 1974;
the Falkland Islands conflict of 1982;
the Grenada landings in 1983;
the Iran-Iraq conflict of 1980–8; and
the Gulf War of early 1991.

Most of these operations were carried out under the auspices and responsibility of the ICRC, which supplied some or all of the logistics used and was in most cases responsible for co-ordinating the operations.

It is still too early to talk about a customary rule, but the number and scale of these precedents prove conclusively that the International Committee is well able to handle work of this kind.

* The International Committee’s work for prisoners will not necessarily end with their general repatriation.

The Central Tracing Agency will be asked to make enquiries about many former prisoners who have not returned home, or missing persons whose fate and whereabouts are still unknown. Indeed, it is only to be expected that relatives and friends of missing persons will get into touch with former prisoners and gather information that will oblige the Central Tracing Agency to re-open old files. Unfortunately, in most cases their hopes will be in vain.

Some prisoners of war and civilian detainees may object to being repatriated, and ask for asylum in any country that will take them, particularly when their own country is no longer an independent political entity, is occupied, or has suffered political upheavals that make them fear persecution if they were repatriated. Once released by the detaining authority, they will have to be treated as stateless persons or refugees for whom institutions such as the Office of the United Nations High Commissioner for Refugees are responsible. The ICRC may be asked to help by issuing them with travel documents to enter a host country.

Moreover, the Geneva Conventions allow the detaining power to detain prisoners of war and civilian internees who are being prosecuted for, or have been convicted of, a crime or indictable offence, until the end of the criminal proceedings and, if circumstances require, until they have served their sentence. They will remain, however, under the protection of the Geneva

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Conventions until their final release and repatriation. The ICRC is therefore entitled to go on helping these prisoners in all the ways in which it had previously helped all other prisoners.

Lastly, so that prisoners will not suffer the tragic fate of being ‘forgotten’ in repatriation operations, the Geneva Conventions stipulate, in mandatory terms, that the belligerents shall establish commissions to search for dispersed prisoners and repatriate them with the least possible delay. The belligerents are free to form these commissions as they see fit, but there is nothing to prevent them from asking the ICRC to take over this task. For instance, after the repatriation of the prisoners captured in the conflict between India and Pakistan of summer 1965, ICRC delegates were requested to visit several camps and prisons on either side of the cease-fire lines to make sure that none of the other warring party’s nationals had been left behind there.

4. Conclusions

In general, the ICRC was excluded from the operations for the release and repatriation of prisoners of war and civilian captives that took place after the Second World War. Germany and Japan having surrendered unconditionally, the victors could bring their own nationals home as and when they pleased, and decide unilaterally what to do about enemy prisoners. A neutral intermediary was no longer needed.

This situation is reflected in the Geneva Conventions of 1949, which do not assign any definite task to the International Committee with regard to the repatriation of prisoners other than that of appointing the neutral members of Mixed Medical Commissions.

History, however, has decided otherwise. Belligerents have generally accepted or asked for the Committee’s help either in reaching or in implementing an agreement for the release and repatriation of prisoners.

Besides, in practice the role of a conciliator and the capacity to assist in implementing an agreement are mutually complementary. By offering the services of its delegates, its own practical experience and its logistic resources, thus backing up its diplomatic approaches with its operational capacity, the ICRC has sometimes managed to open the way for an agreement on the repatriation of prisoners. Conversely, its active diplomacy as a conciliator often leads to an agreement providing for the ICRC’s help in its implementation. Thus active diplomacy and operational capacity each support and enhance the other.

But the full significance – and the limits – of the International Committee’s work for the repatriation of prisoners derives from its role as guardian of the fundamental humanitarian principles. For whether it is requested to help parties to a conflict to work out an agreement for the repatriation of captives, or to take part in repatriation operations, the ICRC must never lose sight of the humanitarian principles that underlie all its activities. Nor must their
practical significance be overlooked. The ICRC’s insistence on compliance with those principles has often prevented negotiations from becoming bogged down in sordid haggling and placed them in a humanitarian perspective again, the only one in which a solution could be found. On the other hand, the ICRC has sometimes had to refuse its own and its delegates’ help when the proposed agreement would have required it to contravene the fundamental humanitarian principles which it is its privilege and duty to uphold.

Once more, it is clear that what makes the International Committee’s work so unique and so effective is neither its steadfast insistence on the fundamental humanitarian principles nor its operational expertise alone, but both of these together: its strength lies in its combined role as guardian of the fundamental humanitarian principles and ability to give practical help in putting them into effect.

Indeed, above and beyond its immediate benefit to the prisoners concerned, any release and repatriation operation reaffirms the essential humanitarian principle that victory in war does not confer unlimited rights over an enemy who has surrendered unconditionally.

Notes


2 Under Article 28 of the First Convention and Article 33 of the Third Convention, captured army medical personnel are not prisoners of war, but must be granted at least the advantages and protection conferred on prisoners of war by the Third Convention.


4 See the many examples quoted by Dr E. Gurlt, Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege, Verlag von F. C. W. Vogel, Leipzig, 1873, passim.


8 Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre, réunie à Genève du 1er au 27 juillet 1929, Imprimerie du Journal de
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10 Third Convention, Article 109, paragraph 3.
11 Third Convention, Article 110.
12 Third Convention, Annex I.
13 Third Convention, Article 110, paragraph 4.
14 Third Convention, Articles 112 and 113 and Annex II.
15 Third Convention, Articles 2 and 8 of Annex II.
16 Third Convention, Article 117.
17 In French: ‘petits grands blessés’.

19 Ibid., vol. III, p. 249.
20 Rapport général, p. 108.
23 Third Convention, Articles 109, paragraph 2, 110, paragraph 2, and Annex I, Part B.
27 Third Convention, Article 109, paragraph 2.
30 First Convention, Article 28.
31 First Convention, Article 30.
33 For example, Article 24 of the Peace of the Pyrenees, signed by France and Spain on 7 November 1659, provided that in case of renewed hostilities subjects of either power should be allowed a period of six months to remove their persons and property to any destination of their choice. See The Consolidated Treaty Series, edited by Clive Parry, Oceana Publications, New York, 1969–86, vol. 5, p. 338.
36 Tokyo Draft, Article 15, Quinzième Conférence internationale de la Croix-Rouge tenue à Tokyo du 20 au 29 octobre 1934, Compte rendu, Japanese Red Cross Society, Tokyo, 1934, p. 264; Draft International Convention concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in a Territory occupied by it, ICRC Library, ref. 341.3/44 – bis.
37 Tokyo Draft, Articles 2 and 4, p. 263.
39 Fourth Convention, Article 42.
40 Fourth Convention, Articles 68 and 78.


Thucydides, The History of the Peloponnesian War, Book V, Chapter I, paras. 18–24.


Handbook of the International Red Cross, p. 304.

Armistice with Bulgaria, 29 September 1918, Article 6; armistice with the Ottoman Empire, 30 October 1918, Article 4; armistice with Austria-Hungary, 3 November 1918, Article 7; armistice with Germany, 11 November 1918, Article 10. De Martens, Nouveau Recueil général de Traités, third series, vol. XI, pp. 126, 159, 165 and 174.

Article 6 of the armistice with Bulgaria; Article 22 of the armistice with the Ottoman Empire; Article 10 of the armistice with Germany. The repatriation of Austro-Hungarian prisoners was not settled by the armistice agreement of 3 November 1918. De Martens, Nouveau Recueil général de Traités, third series, vol. XI, pp. 126, 160 and 174.


Article 160 of the peace treaty signed with Austria at Saint-Germain-en-Laye on 10 September 1919, Article 105 of the peace treaty signed with Bulgaria at Neuilly-sur-Seine on 27 November 1919, and Article 144 of the peace treaty signed with Hungary at Trianon on 4 June 1920. Article 208 of the peace treaty signed with Turkey at Sèvres on 10 August 1920 provided that repatriation operations should continue after the entry into force of the treaty. De Martens, Nouveau Recueil général de Traités, third series, vol. XI, p. 733; vol. XII, pp. 350, 461 and 715.

In fact, the United States, Great Britain, Italy and Serbia began repatriating their German prisoners in the autumn of 1919, whereas France, which held the greatest number of German prisoners, did not start repatriating them until the treaty entered into force.

Actes 1929, p. 706; The Laws of Armed Conflicts, p. 356.

Both questions are examined in great detail by Christiane Shields Delessert in Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, Études Suisses de Droit international, vol. 5, Schulthess Polygraphischer Verlag, Zurich, 1977, which contains an extensive bibliography (pp. 215–25). I do not, however, share all the opinions expressed in that work.

ICRC practice will be examined in the next section of the present chapter.


Exclusion of the ICRC might well be considered contrary, however, to Article 126 of the Third Convention, which states that delegates of the Protecting Powers and ICRC delegates ‘shall also be allowed to go to places of departure, passage and arrival of prisoners who are being transferred’.


The Repatriation of Prisoners


60 IRRC, no. 211, July–August 1979, p. 211; Annual Report 1979, p. 39.


62 Iraqi and Coalition representatives met five times in 1991 under ICRC auspices, on 7, 21 and 28 March and on 12 and 29 April. As the meetings were held in Riyadh, not only did the ICRC chair them and provide the secretariat, it also transported the Iraqi delegates from Baghdad to Riyadh. The commanders of the American, Saudi and Iraqi armed forces had met previously at Safwan, in southern Iraq, on 3 March 1991, at a first meeting which the ICRC was not invited to attend. ICRC Archives, files 210 (19–70) and 210 (70).


64 The Gospel according to St Matthew, 5 v.13.

65 Third Convention, Article 112, paragraph 1.


68 Third Convention, Article 109, paragraph 3.

69 Fourth Convention, Articles 132, 134 and 135.


71 This is not the place to examine whether the ICRC should agree to ascertain the prisoners’ true wishes at the request of only one of the parties to a conflict. There would probably be serious objections to its doing so.


73 ICRC Archives, files 210 (70–71) and 210 (71–70); IRRC, no. 278, September–October 1990, pp. 445–6.

74 ICRC Archives, files 210 (19–70), 210 (70–00), 210 (70–214) and 229 (70–214); Internal Information Bulletin, March to June 1991.


77 Thus, a seriously wounded Israeli prisoner of war was released in Nicosia on 15 August 1970, in accordance with Articles 109 and 110 of the Third Convention, IRRC, no. 114, September 1970, p. 523.


83 In principle a signed handover certificate is not essential, and prisoners may perfectly well be released without that formality. In most cases, however, the detaining authority will insist on being given a document relieving it of responsibility for the released prisoners.

84 Thus, in all operations at the Suez Canal the prisoners were handed over by the detaining authority to ICRC delegates on the Canal bank, ferried to the other bank in launches bearing the ICRC emblem and there handed over to the representatives of their power of origin. The operations were likewise carried out under ICRC escort at Kuneitra, where the no man's land between the Israeli and Syrian outposts was a few hundred metres across.

85 Thus, in June 1973 the ICRC delegation in Bangladesh settled all the formalities for a seriously ill Pakistani prisoner of war to cross India on his way back to Pakistan, IRRC, no. 148, July 1973, p. 361.

86 Third Convention, Article 119, paragraph 5; Fourth Convention, Article 133, paragraph 2.

87 Third Convention, Article 5; Fourth Convention, Article 6.

88 Third Convention, Article 119, paragraph 6; Fourth Convention, Article 133, paragraph 3.


References

To my knowledge, the only study of work by the International Committee to repatriate prisoners is Renée-Marguerite Frick-Cramer, Repatriation of Prisoners of War from the Eastern Front after the War of 1914–1918, ICRC, Geneva, 1944.


CONCLUSIONS

Anyone whose rights have been infringed knows how hard it is to get them restored, even at the best of times and in countries that are proud of the independence of their courts. Prisoners of war and civilian captives are defenceless against arbitrary treatment by an enemy power, and for them redress is impossible. Some degree of external supervision, and the presence of a benevolent third party, are essential lest the legal safeguards for war victims become a dead letter.

The Geneva Conventions therefore provide for mechanisms to facilitate and ensure the regular application and proper supervision of these safeguards. These mechanisms are not perfect, but in the present state of international relations they are the best possible – and usually the only – guarantee of captives’ rights. Far from being, as they have often been called, an optional accessory of the protection given by the Geneva Conventions, to be adopted or ignored at the belligerents’ pleasure, they are part and parcel of that protection, for they have been set up by the Conventions themselves.

The International Committee of the Red Cross can only invigilate, it cannot enforce. It cannot ensure by its unaided efforts that captives’ rights are respected. That respect depends on whether the parties to the conflict do or do not intend to honour their humanitarian commitments. The ICRC cannot prevent all breaches of the Conventions, but its delegates’ visits to places of detention and the duties entrusted to it are valuable safeguards that enable captives to make their voice heard and assert their rights.

Conversely, to prevent the International Committee from doing its work is a breach of the Geneva Conventions and a strong indication that further breaches will follow, for the Conventions themselves assign to the ICRC the various tasks incumbent upon it.

In a non-international armed conflict, the parties are not obliged to accept the ICRC’s offers of services or to allow its delegates access to the prisoners they hold. However, persons who take no active part in the hostilities, in particular those whose liberty has been restricted, must in all circumstances be treated humanely. They are entitled to respect for their person and their dignity and must receive the medical care their condition requires; they must be allowed to receive individual and collective relief supplies and must, whenever possible, be allowed to correspond with members of their family. Does
not compliance with these obligations demand acceptance of the help of a third party?

No matter what the parties’ obligations, the plight of the captives must never be forgotten: the tragic circumstances of the thousands of men and women, combatants and non-combatants, who are held far from their loved ones in a hostile environment, forced to endure countless privations, sometimes for years on end, subject without recourse to the arbitrary decisions of an enemy power, and all too often the victims of repeated humiliation if not unspeakable torture.

Of course, the International Committee of the Red Cross is powerless to prevent the almost intolerable ordeal of captivity. But it can at least render that captivity less cruel by the warmth of its presence, by opening a small window on the outside world, by renewing contact between the captives and their loved ones, by protecting them from abuse of power and loss of identity, by providing material assistance and, last but not least, by holding out the promise of freedom.
PART SIX

THE PROTECTION OF THE CIVILIAN POPULATION
INTRODUCTION

War is the business of those who wage it, but it also hits the civilian population, which is both its victim and its prize.

Attacks on a peaceful population are prohibited. But war does not spare a peaceful population, which suffers because weapons are never perfectly accurate and targets are not always properly identified, or because civilians are attacked indiscriminately along with military objectives, or deliberately in terror raids or as a reprisal. Whether the attacks are accidental or deliberate, the civilian population must be protected from the effects of hostilities.

Besides causing physical harm, war severs communications, tears families apart and uproots whole populations in terrified flight, thereby destroying the fabric of family life and inflicting the anguish of separation. Solutions must then be found to enable members of dispersed families to exchange messages with each other and ultimately be reunited.

War also places civilians in enemy hands, either as the population of an invaded territory or as nationals of one party to the conflict who happen to be in enemy territory when war breaks out. In either case they need to be protected against the potential tyranny, abuse and violence of a hostile power.

The civilian population will be hard hit by the privations which inexorably accompany armed conflict, and by the attempts of all belligerents to cripple the enemy economy and cut off its sources of supply. When famine appears and essential items are no longer available, relief operations are indispensable.

My original intention of examining the tasks assigned to the International Committee to protect the population of an occupied territory unfortunately had to be dropped, for the legal problems raised by enemy occupation are too numerous and too complicated to be dealt with here. (Certain aspects of the ICRC’s activities in aid of the population in occupied territory have nevertheless been considered in earlier chapters. Those for persons arrested or detained in occupied territory are dealt with in Book II, Part V, whereas the activities of the Central Tracing Agency, and relief operations in aid of the population of occupied territory, are dealt with in Book II, Part VI, Chapters II and IV.)
Consideration will accordingly be given to four areas of ICRC activity:

- protection of the civilian population against the effects of hostilities;
- family messages and the reunification of dispersed families;
- protection of aliens in the territory of a party to conflict;
- relief operations in aid of the civilian population.

Such are the subjects of the following chapters.
CHAPTER I

THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES

A lion has come out of his lair
the destroyer of nations
he has struck his tents,
he has broken camp
to harry your land …
Like clouds the enemy advances
with a whirlwind of chariots;
his horses are swifter than eagles –
alas, we are overwhelmed!
Jeremiah, 4.7 and 4.13,
The New English Bible.

1. Introduction

War is a contention between states that is fought out by their armed forces. The civilian population taking no part in hostilities must be spared and protected. This fundamental principle underlies the whole of the law of war, and is the basis of the Geneva and Hague Conventions.

It has taken centuries for this principle to be accepted. Always and in all civilizations there has been a chivalrous feeling that man should fight man, and that to attack women, children and the elderly is an act of abject cowardice. But this feeling no longer applied once the fighting was over. Defeat placed the civilian population at the victor’s mercy. He could do what he liked with them, and all too often they were enslaved, deported or put to death. History is, unfortunately, an endless recital of towns overrun by rampaging soldiers, of rape, pillage, murder, fields laid waste, cities burned to the ground and their inhabitants slaughtered.

Only in modern times, with the advent of professional armies, did war come to be considered as a dispute between princes and not as a mortal struggle between two nations. The civilian population took no part in the clash of opposing armies and therefore had to be spared.

Credit for laying down unequivocally the principle that non-combatants should be immune from attack is due to Jean-Jacques Rousseau, who writes:

War is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers; not as members of their country, but only as its defenders.1
This principle was progressively accepted by legal opinion and state practice. The gentlemanly warfare of the eighteenth century – known in French as ‘la guerre en dentelles’ – was no minuet, but at least it spared the civilian population, a practice that continued throughout the nineteenth century. So the Hague Conventions of 1899 and 1907 gave effect to a principle already firmly rooted in customary law when the preamble to the Declaration of St Petersburg of 1868 put it into words: ‘... the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy’.2

Yet as the principle that the civilian population was immune from attack was gaining recognition in international law, its sociological basis was simultaneously being undermined by three new factors which first appeared at the time of the French Revolution and were strongly accentuated by the two world wars.

The first was a change of mentality. The spread of liberal ideas, and even more conspicuously, the rise of nationalism of which conscription was the most visible sign, profoundly affected the status of the civilian population. No longer content to be passive spectators of a struggle on which their own fate depended, civilians took an increasingly active part in hostilities that tended to involve the entire population. The development of militias and other volunteer corps, popular uprisings on the approach of the enemy,3 and the emergence of irregular troops and resistance movements attacking the rear of an occupying army, have blurred the once clear dividing line between armed forces and peaceful civilian population. This trend has reached its peak in our time in the glorification of revolutionary war enlisting all the vital forces of the nation, men, women and children alike.

Secondly, the whole production process has changed. The industrial revolution has enabled arms and munitions to be manufactured on an infinitely larger scale than before, so transforming warfare and drawing on the country’s entire human resources. The clash of armies is now only one aspect of a generalized confrontation in which industrial production and high technology counts for most. War is won or lost in the mines and factories as much as on the battlefield, and this necessarily affects the status of munition and transport workers. In spite of all objections to the concept of ‘quasi-combatants’ used by Anglo-Saxon publicists,4 it does cover a *de facto* category that is neither armed forces nor peaceful population; and in wartime the majority of the civilian population is indeed employed in producing war material.

Finally, there is technological change: long-range artillery, air power and missiles can now reach vitally important centres anywhere in enemy territory. The temptation to destroy the adversary’s industrial production and so render it incapable of continuing the war is all the greater since large urban areas are infinitely more vulnerable than armed forces on the ground. Even more insidious, and infinitely more dangerous for the future of civilization, is the temptation to break enemy morale by attacks primarily intended to
spread terror among the civilian population. The only difference between a bomb or missile that devastates a peaceful town and a terrorist hand-grenade thrown among civilians in a restaurant, a market or cinema is one of scale. On the road to total war the most advanced technology and barefoot guerrilla warfare go hand in hand.

The results are eloquent: in the First World War civilian casualties accounted for only 5 per cent of the total number of war victims, in the Second World War nearly 50 per cent, and in the Korean and Indo-Chinese wars over 80 per cent. One less obvious but equally real consequence of technological progress is the constant threat of nuclear warheads to the civilian population in cities all over the world, and ultimately to the future of mankind.

Faced with these ominous developments, what can the International Committee do?

For the sake of clarity, a distinction must be drawn between:

a) efforts to restore respect for the general principle of civilian immunity from the effects of hostilities; and

b) activities on behalf of persons and property covered by special protective regulations, namely:
   - civilian wounded and sick, and civilian medical personnel and installations;
   - civil defence personnel and installations;
   - truces and evacuations;
   - safety zones.

These will be the next two subjects considered.

I-A. THE GENERAL PRINCIPLE OF IMMUNITY OF THE CIVILIAN POPULATION FROM THE EFFECTS OF HOSTILITIES

1. The legal bases

Beyond question, the general principle that the civilian population shall be immune from the effects of hostilities is above all based on customary law; it meets a fundamental requirement of humanity and civilization, and was accepted by legal opinion and state practice long before being confirmed in treaties. Its development can however be most easily followed through the various stages of its codification.

The main provisions are Articles 25 to 28 of the Hague Regulations:

Art. 25. – The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.

Art. 26. – The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.
Art. 27. – In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Art. 28. – The pillage of a town or place, even when taken by assault, is prohibited.7

As a codification of customary law these rules are binding on all members of the international community whether or not they are parties to the Hague Convention (IV) of 18 October 1907. As regards bombardment by naval forces, the principle that the civilian population is immune from attack is enshrined in Articles 1 and 2 of the Hague Convention (IX) of 18 October 1907:

Art. 1. – The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden ....

Art. 2. – Military works, military or naval establishments, depots of arms or war matériel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances ....8

The difference between the two sets of protective rules is obvious. Whereas the rules applicable to war on land are based on the distinction between defended and undefended localities, those applicable to war at sea are concerned first and foremost with the notion of military objective.

This difference is easily explained. An officer commanding an army in the field has every possibility of seizing an undefended locality and destroying or taking over any installations of military interest there. To bombard it would therefore cause damage that no military interest could justify.

A fleet commander, on the other hand, would not normally be able to seize an enemy locality, even if it were undefended, in order to destroy or take possession of any military resources there. He may therefore legitimately bombard it provided the bombardment is restricted to military objectives.9

Except for the requirement of a prior summons (notification), which is impracticable in modern warfare, these principles are still as valid as ever in their respective contexts.

On the other hand, the very notion of ‘undefended locality’ became largely meaningless with the emergence of continuous fronts. Could any town or village behind the enemy lines still be styled an undefended locality? Could it legitimately be destroyed by long-range artillery or air bombardment simply because it lay behind the lines?
These questions were far from being settled when the First World War broke out. The air forces of both sides bombed not only objectives in support of ground and naval forces, but also objectives outside the actual combat zone. The belligerents usually tried to justify their bombing of towns in rear areas by representing them as reprisals.\(^{10}\)

A clear statement of the rules of air warfare was therefore necessary to protect the civilian population from the grave dangers of air raids.

The Washington Conference of 1922 on the Limitation of Armaments appointed a Commission of Jurists to prepare rules relating to air warfare. Meeting in The Hague in the winter of 1922–3, the Commission rejected the concept of undefended localities as inapplicable to air warfare and adopted the principle that aerial bombardment should be limited to military objectives. For this purpose it prepared a draft convention, Articles 22–5 of which read as follows:

Art. 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

Art. 23. Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

Art. 24. (1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

(5) A belligerent state is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

Art. 25. In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects, or places than those specified above...
is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white. ....

Although the draft was never ratified, it may be considered as ‘an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war’. The failure of the Disarmament Conference (Geneva, 1932–4), followed by increasingly murderous bombardments in the Spanish Civil War and the Sino-Japanese conflict, gave a fresh impetus to efforts to protect the civilian population. In a resolution adopted on 30 September 1938 the League of Nations Assembly stressed the need to adopt regulations specially adapted to air warfare, and recognized that the following three principles were an integral part of positive international law and must serve as a basis for any subsequent regulations:

1. The intentional bombing of civilian populations is illegal;
2. Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
3. Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.

Unfortunately, the authority of this resolution was undermined because the three protagonists it was intended to call to order – Germany, Italy and Japan – were not present, and because the two all-important questions of defining the civilian population and legitimate objectives had been shirked.

Everyone knows what followed. Whereas all the belligerents proclaimed at the start of the Second World War that they were firmly resolved to confine their air attacks to purely military objectives, first Germany, and later the Allies, progressively ignored all constraints. Instead, they adopted the policy of ‘target-area bombing’, whereby any enemy locality protected by flak and containing several separate military objectives, such as railway stations, bridges and factories, could be considered as a single objective to be attacked without further ado. Large industrial cities were methodically destroyed quarter by quarter with complete disregard for international law, a policy that culminated in the annihilation of Hiroshima and Nagasaki.

Indeed, air raids on enemy residential areas were so generalized as to suggest that the principle that the civilian population must be immune from attack had fallen into disuse, for can a legal rule still be said to exist when its violation has become the norm?

It was the duty of the International Military Tribunal at Nuremberg to restore the rule of law by punishing the leaders of the Third Reich for violating it. However, the Tribunal did not hand down any convictions for
indiscriminate bombardment,\textsuperscript{16} although its Charter qualified ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity’\textsuperscript{17} as war crimes. In actual fact, the responsibility for such bombardment was shared by all the belligerents; furthermore, the rules limiting aerial bombardment had been so grossly breached that they could hardly be used as a basis for conviction.

A general limitation of aerial bombardment was not on the agenda of the 1949 Diplomatic Conference, which discussed it only marginally.\textsuperscript{18} The Conference did, however, establish rules for the special protection of civilian medical personnel and installations, and of hospital zones and localities as well as safety zones. In spite of all statements to the contrary, its decision to do so reflected the loss of authority of the general principle that the civilian population shall be immune from the effects of hostilities.

The result was a paradox. Whereas the Diplomatic Conference had revised every detail of the rules protecting war victims, serious doubts remained as to whether the general principle of the civilian population’s immunity from attack was still valid. Yet much of humanitarian law, including the Fourth Convention just adopted by the Conference, rests on that very principle.

It was foreseeable that in the long term this contradiction would sap the authority of the Law of Geneva.

Extremely alarmed by this prospect, the International Committee took action on two fronts which, although interrelated, are best considered separately for the sake of clarity. They are:

a) the prohibition of weapons of mass destruction (atomic, bacteriological and chemical weapons);

b) restoration of the principle of immunity of the civilian population from the effects of hostilities.

* *

The International Committee made known its firm opposition to atomic and indiscriminate weapons in its appeals of 5 September 1945 and 5 April 1950.\textsuperscript{19} Emphasizing that it was concerned for humanitarian reasons only, and citing the precedents which made it competent to discuss the matter, the ICRC expressed as follows its acute concern at the development of weapons of mass destruction.

Today … the International Committee feels obliged to underline the extreme gravity of the situation. Up to the Second World War it was still to some extent possible to keep pace with the destructive power of armaments. The civilian population, nominally sheltered by International Law against attack during war, still enjoyed a certain degree of protection, but because of the power of the arms used, were increasingly struck down side by side with combatants. Within the radius affected by the atomic bomb, protection is no longer feasible. The use of
this arm is less a development of the methods of warfare than the institution of an entirely new conception of war, first exemplified by mass bombardments and later by the employment of rocket bombs. However condemned—and rightly so—by successive treaties, war still presupposed certain restrictive rules; above all did it presuppose discrimination between combatants and non-combatants. With atomic bombs and non-directed missiles, discrimination becomes impossible. Such arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple. Furthermore, the suffering caused by the atomic bomb is out of proportion to strategic necessity; many of its victims die as a result of burns after weeks of agony, or are stricken for life with painful infirmities. Finally, its effects, immediate and lasting, prevent access to the wounded and their treatment.

In these conditions, the mere assumption that atomic weapons may be used, for whatever reason, is enough to make illusory any attempt to protect non-combatants by legal texts. Law, written or unwritten, is powerless when confronted with the total destruction the use of this arm implies. The International Committee of the Red Cross, which watches particularly over the Conventions that protect the victims of war, must declare that the foundations on which its mission is based will disappear, if deliberate attack on persons whose right to protection is unchallenged is once countenanced.

The International Committee of the Red Cross hereby requests the Governments signatory to the 1949 Geneva Conventions, to take, as a logical complement to the said Conventions—and to the Geneva Protocol of 1925—all steps to reach an agreement on the prohibition of atomic weapons, and in a general way, of all non-directed missiles. The International Committee, once again, must keep itself apart from all political and military considerations. But if, in a strictly humanitarian capacity, it can aid in solving the problem, it is prepared, in accordance with the principles of the Red Cross, to devote itself to this task.20

The International Committee’s concern was shared by the Red Cross as a whole. Time and time again, the International Conference of the Red Cross has warned of the danger to non-combatants, and indeed to the very future of civilization, of weapons of mass destruction.21

However, the political and strategic implications of this danger far exceed Red Cross competence to deal with them. The Conference therefore restricted itself to expressing its deep concern, appealing to the belligerents to renounce weapons of mass destruction, and inviting governments to agree among themselves to prohibit them. But at least it has done this much, and continues to do so, and that is to its credit.

Notoriously, governments are no nearer an agreement to ban the manufacture, stockpiling and use of these terrifying weapons. The only relevant provisions of positive law on this subject are still Article 23(a) of the Hague Regulations, which forbids the use of poison or poisoned weapons, and the Geneva Protocol of 17 June 1925 prohibiting the use of asphyxiating, poisonous or other gases and of bacteriological methods of warfare.22 Fifty years after Hiroshima, the crucial question of the legality of nuclear weapons is still hotly debated.
Failing an agreement on weapons, it might perhaps be possible to agree on rules to protect the civilian population. The principle of the civilian population’s immunity from attack had therefore to be restored.

The International Committee was naturally extremely concerned about the disparity between the precise and detailed rules adopted by the 1949 Conference to protect wounded, sick and shipwrecked military personnel, prisoners of war and civilians in enemy hands, and the chaotic state of the rules protecting the civilian population against the effects of hostilities.

In 1954 the ICRC called a conference of experts to examine the legal problems of protecting the civilian population and other victims of armed conflicts against air warfare and the use of weapons of mass destruction.

With the backing of the Board of Governors of the League of Red Cross Societies and the help of highly qualified experts, the International Committee prepared draft rules to limit the dangers to which the civilian population was exposed in wartime. These were in fact a draft convention to restore the principle of the immunity of the civilian population from attack, define military objectives and specify that they are the only legitimate targets for attack, prescribe the precautions to be taken in attack, and prohibit target-area bombing and weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

The Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War were submitted to the Nineteenth International Conference of the Red Cross which met in New Delhi in October and November 1957. The most controversial point was of course the use of atomic weapons. The delegates from the socialist countries complained that the ICRC draft was too vague, and demanded that nuclear and thermonuclear weapons should be banned outright. The delegates of the Western countries condemned prohibition as unrealistic unless it were accompanied by general disarmament and an efficient system of inspection. The Conference finally requested the International Committee to transmit the Draft Rules to the governments for their consideration. In fact, the proposal was scuppered.

Presumably, the only conclusion to be drawn from this failure was that most states wanted to keep a free hand.

Since governments did not want any detailed regulations, the International Committee could only make a fresh start on the protection of the civilian
population by basing its proposals on the most elementary principles. This it did in a distinctly tentative report to the Twentieth International Conference of the Red Cross, held in Vienna in October 1965.27

The Conference unanimously adopted a resolution urging the ICRC to pursue its efforts to that effect, and solemnly declared that parties to a conflict should conform at least to the following principles:

– that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
– that it is prohibited to launch attacks against the civilian populations as such;
– that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
– that the general principles of the Law of War apply to nuclear and similar weapons.28

The United Nations General Assembly incorporated all but the last of these principles in its Resolution 2444 (XXIII), which it adopted unanimously on 19 December 1968.29 It also reaffirmed in its Resolution 2675 (XXV), adopted by consensus on 9 December 1970, eight basic principles which may be considered as expressing the international community’s conviction that under international law:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
4. Civilian populations as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.30

The protection of the civilian population against the effects of hostilities was also one of the main items on the agenda of the Conferences of Government

The result was Articles 48 to 58 of Protocol I, and especially Articles 48, 51 and 52:

**ARTICLE 48 – BASIC RULE**

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

**ARTICLE 51 – PROTECTION OF THE CIVILIAN POPULATION**

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
   (a) those which are not directed at a specific military objective;
   (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
   (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
   (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
   (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict...
shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

**ARTICLE 52 – GENERAL PROTECTION OF CIVILIAN OBJECTS**

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

In addition there are special provisions for the protection of cultural objects and places of worship (Article 53), objects indispensable to the survival of the civilian population such as reserves of foodstuffs and drinking water (Article 54), the natural environment (Article 55), and works and installations containing dangerous forces, such as dams, dykes and nuclear electrical generating stations, which should not be made the object of attack if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population (Article 56). Articles 57 and 58 state the precautionary measures to be taken in and against attacks.

There can be no doubt that the greatest achievement of the Diplomatic Conference is to have restored the general principle of immunity of the civilian population from attack. The categorical prohibition of any intentional attack on the civilian population, and of target-area bombing, are provisions of paramount importance.

Nevertheless there are still several reasons for disquiet.

First of all, while the Diplomatic Conference has greatly extended the scope of the protection given by the Conventions and therefore also the restrictions imposed on belligerents, it has not strengthened the hand of the institutions appointed to monitor their application, even though experience has constantly shown that unless provision is made for scrutiny, the rules of humanitarian law are much less likely to be respected.

Secondly, although the Conference claimed that Article 48 of Protocol I restored the fundamental distinction between the civilian population and combatants, and between civilian objects and military objectives, Article 44
thereof completely obscures that very distinction by giving the combatants full licence to merge with the civilian population.

Lastly, and all too obviously, the Diplomatic Conference failed to agree on the crucial question – on which everything ultimately depends – of a restrictive definition of military objectives. In view of the importance of industrial production in modern war, what is there that cannot be called a military objective? What about arms and ammunition factories and their subcontractor factories, or steel works, rolling mills and blast furnaces, or mines, electric power stations and refineries which supply war industries as well as the civilian population? What about the entire communications network of roads, bridges, railways and railway stations, canals, sea and river ports, telephone exchanges, electricity sub-stations and the like, whose destruction would bring the enemy war effort to a halt? And what about offices that coordinate economic activity?

If the definition of a military objective is gradually extended to include all these, little remains of the immunity promised to the civilian population. If the line has to be drawn somewhere, the Conference should surely have drawn it distinctly, rather than wrap it up in a general formula such as that in paragraph 2 of Article 52 for each belligerent to interpret as best suits it.

Furthermore, while restoring the general principle that the civilian population shall be immune from attack, the Diplomatic Conference has simultaneously created several systems of special protection by reviving the old concept of non-defended localities and extending the system of safety zones. This can only mean that the Conference itself was none too sure that the general principle it had just revived would be respected.

* *

Is the attacker alone obliged to respect the principle of immunity of the civilian population? Definitely not. That principle is a corollary of the fundamental distinction between combatants and civilians, and between military objectives and civilian objects, a distinction no less – and perhaps even more – mandatory in defence than in attack. In other words, the civilian population must never be used to shield military objectives.

This prohibition applies unreservedly to foreign nationals and the population of occupied territory. Article 28 of the Fourth Convention clearly stipulates that: ‘The presence of a protected person may not be used to render certain points or areas immune from military operations.’ Strictly speaking, however, this provision applies only to the relations between a belligerent and foreign nationals, and not between a party to a conflict and its own population.

May a belligerent deliberately site military objectives in civilian areas on its own territory? The 1949 Conventions do not explicitly prohibit this. But if a belligerent did so it would of course be responsible for the harm done to the civilian population by enemy attacks on those objectives. It goes without
saying that a belligerent cannot continue to claim immunity from attack for its civilian population while using them to shield military objectives.

Article 58 of Protocol I answers this question, although not conclusively, as follows:

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

This provision amplifies and supplements Article 51, paragraph 7, of Protocol I, and Article 28 of the Fourth Convention. It applies equally to a belligerent’s relations with its own population and with an enemy population.

*

Does the principle that the civilian population is immune from the effects of hostilities also apply in non-international armed conflicts? It certainly does.

Whether the conflict is international or non-international it is inconceivable that belligerents should be free to attack a peaceful population. The fundamental legal principle that the civilian population shall be immune from attack is an elementary requirement of humanity, of law and order, of civilization. It is equally out of the question that it should apply in some conflicts but not in others.

These conclusions are confirmed by Article 3 common to all four 1949 Geneva Conventions, which stipulates that ‘persons taking no active part in the hostilities ... shall in all circumstances be treated humanely’. Clearly, any attack on the civilian population as such, and any attack that did not distinguish between civilian persons and objects, on the one hand, and military objectives, on the other, would be a breach of that obligation.

The conclusions are also confirmed by the practice of the International Conferences of the Red Cross: Resolution IX of the Sixteenth Conference (London, 1938) and Resolution XXVIII of the Twentieth Conference (Vienna, 1965) apply equally to non-international and international armed conflicts.

The resolution adopted on 30 September 1938 by the League of Nations Assembly likewise related as much to the Spanish Civil War as to the Sino-Japanese conflict; similarly, Resolutions 2444 (XXIII) 1968 and 2675 (XXV) 1970 of the United Nations General Assembly apply to all armed conflicts of whatever description.

It was, however, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law that most decisively helped to restore the principle that the civilian population shall be immune from
attack. Article 13 of Additional Protocol II, which may be considered as codifying the law in force, states:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

It is also prohibited to attack, destroy, remove, or render useless, objects indispensable to the survival of the civilian population (Article 14), or to attack installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations (Article 15), or cultural objects and places of worship (Article 16).

The principle of immunity of the civilian population thus applies to internal and international conflicts alike. The terms and conditions for its application are much the same in both. It is easy to see why. The immunity of the civilian population stems from its own peaceful nature, not from the nature of the conflict.

2. ICRC practice

ICRC practice will now be considered in relation to the legal basis just outlined. At the outbreak of each new conflict the International Committee has restated the principle that the civilian population must be immune from the effects of hostilities and has called upon the belligerents to respect it. For example:

- In its appeal of 12 March 1948 concerning Palestine the ICRC demanded ‘Safety for all who take no part in fighting, especially women, children and the aged’. In its offers of services to all parties in the Korean War from 26 June 1950 onwards, the ICRC quoted Article 3 of the Conventions in full and demanded that it be respected.
- In its appeal of 31 October 1956 relating to the events in Hungary the ICRC stressed that ‘All those who take no part in the fighting must be respected’.
- In its appeal of 2 November 1956 concerning the Suez conflict the ICRC again stressed that ‘Non-combatants, especially women and children, must never be attacked by the armed forces, but should, on the contrary, always be respected and humanely treated’.
- In its appeal of 11 June 1965 concerning the Vietnam War the ICRC issued the earnest reminder that ‘Parties to the conflict shall respect and protect
civilians taking no part in hostilities, they shall abstain from attack against such persons and subject them to no form of violence'.

There is no need for further examples, for this has been the ICRC's consistent practice in internal and international conflicts alike. In each new conflict the International Committee has called on both sides, either explicitly or by referring to the provisions of the Conventions protecting non-combatants, to observe the principle of immunity of the civilian population.

Yet the ICRC has not merely spelt out the law in force. On the contrary, alarmed by news of the plight of the civilian population in the Arab-Israeli conflict of October 1973, the ICRC proposed to all the belligerents (Egypt, Iraq, Israel and Syria) that they apply Articles 46 ('Protection of the civilian population'), 47 ('General protection of civilian objects') and 50 ('Precautions in attack') of the Draft Additional Protocol relating to international armed conflicts, although the draft had not yet been adopted as Protocol I. After some misunderstandings that were eventually cleared up in subsequent correspondence, all governments concerned accepted this proposal.

So far as I am aware, the ICRC did not take similar action in later conflicts.

However, the most sensitive problems the International Committee has to face obviously relate to violations of the principle of immunity of the civilian population from attack.

Having proclaimed the principle and demanded that it be respected, the ICRC cannot disregard violations of it. On the other hand, to censure such violations is tantamount to censuring the methods and means of warfare used. But is the ICRC entitled to voice an opinion on the belligerents' conduct of hostilities?

This question caused bitter controversy in the Vietnam War, since the parties to the conflict repeatedly accused each other of attacking a peaceful civilian population. The fiercest argument was about the intensive aerial bombardment of Vietnam.

The government and Red Cross Society of North Vietnam repeatedly condemned the American air attacks as contrary both to *jus ad bellum* and *jus in bello*. As regards *jus ad bellum* the Hanoi government argued that since the United States had not declared war, the attacks were acts of piracy liable for judgment under criminal law. As regards *jus in bello*, it accused the United States of indiscriminate bombing and even of deliberate attacks on civilian targets, condemned the destruction of leper colonies, hospitals, schools, dwellings and other civilian objects, and denounced the casualties inflicted on the peaceful civilian population. It called upon the International Committee to protest against bombing from the air and to use its influence to bring it to an end.

The United States government replied that its air strikes were necessary to prevent infiltration of combatants and military material into South Vietnam. Whilst not absolutely excluding the risk of error, it repeatedly stated that the...
strikes were directed only at strictly military objectives and that American pilots took all precautions humanly possible to avoid harming civilians or causing damage to civilian property.\footnote{41}

Thus, the two sides’ standpoints were diametrically opposed.

In accordance with its customary practice, approved by Resolution XXII of the Seventeenth International Conference of the Red Cross and Resolution XXVII of the Twentieth Conference, the International Committee regularly transmitted to the American Red Cross or the United States government the protests it received from the Red Cross Society or government of the Democratic Republic of Vietnam. The ICRC likewise passed on the replies it received from Washington. The United States government consistently denied the accusations against it and proposed an impartial investigation \emph{in situ}, which Hanoi refused.\footnote{42}

The International Committee also offered its services to transmit information on the geographical location of hospitals, and to help establish hospital zones and localities in which shelter could be given to the wounded and the sick, the infirm, the aged and the children.\footnote{43} The Hanoi government considered this proposal completely inadequate and demanded that the bombing should cease absolutely.

In its correspondence with the United States government the International Committee deplored the suffering inevitably caused by the bombing and drew attention to the rules protecting medical establishments, civilians and civilian objects. The President of the ICRC wrote for instance to Secretary of State Dean Rusk on 27 September 1965 as follows:

\begin{quote}
We take this opportunity of drawing the attention of the American authorities to the respect which is due to hospitals and other medical establishments duly marked, as well as to civilian and military wounded and sick. We consider it necessary to recall … that the Parties to the conflict are obliged to respect and protect, in their operations, civilians not taking part in hostilities, and that they have not an unlimited choice in the means of causing damage to the enemy.\footnote{44}
\end{quote}

Nevertheless, for most of the war the International Committee declined to take a stand on the legality of the American air attacks. The Committee did not break its silence until they were resumed with unprecedented intensity in the summer of 1972, when it wrote to the United States government on 17 July 1972 as follows:

\begin{quote}
Basing itself on considerations of an exclusively humanitarian character as well as upon its role as laid down in its statutes and upon the resolutions of International Conferences of the Red Cross (particularly resolution XXVIII of the XXth Conference), the ICRC addresses an urgent appeal to the Government of the United States to suspend bombardments over Vietnam susceptible of harming the civilian population, of destroying buildings, facilities, equipment or property of all kinds essential to the population’s survival.\footnote{45}
\end{quote}

This approach was not made public. The United States government nevertheless regarded it as unacceptable, and objected that the ICRC had made no
mention of the reasons for the American military operations, namely the North Vietnamese invasion of South Vietnam.46

Finally, after yet another extension of American air attacks on 29 December 1972 the ICRC again appealed to all four parties in the Vietnam War (the United States, the Republic of Vietnam, the Democratic Republic of Vietnam and the National Liberation Front). Expressing its dismay at the latest escalation of military operations, the ICRC made a vehe-
ment appeal to all parties to the conflict to put an end to hostilities. It
reminded them that it was their duty to respect the principle of humanity,
which demands that the wounded, the sick, the prisoners and the whole civil-
ian population shall be afforded protection.47

So for most of the war the International Committee did not take a stand
with regard to the American air raids, but merely passed on the protests
addressed to it. Only in the last months of the conflict, long after the Paris
negotiations had begun, did it depart from its self-imposed reserve.

Should the ICRC have used its recognized right of humanitarian initiative
to condemn the very principle of air bombardment, as several governments
and National Red Cross Societies were pressing it to do? This question is
worth considering, for the ICRC’s reticence was little understood and widely
criticized.

There seem to have been four reasons for its long silence.

a) Insufficient justification in law: the ICRC always had in mind that
whereas the humanitarian law enshrined in the Geneva Conventions of
12 August 1949 was clear and precise, the law on the conduct of hostili-
ties, flouted by the great powers for decades past and alarmingly
incomplete, was in a state of chaos. Everything goes to show that the
ICRC was convinced it could not intervene for want of a sound legal basis
to do so.48

b) The distinction between the Law of Geneva and the Law of The Hague:
the ICRC considered that the Law of The Hague applied to the question
of the legality of air bombardment, and that the ICRC was therefore not
qualified to deliver an opinion on the subject.49

c) Lack of firsthand information: the ICRC felt that it could not decide on
disputed facts on the basis of protests by one of the parties, plus articles
in the press, especially as that party was rejecting all proposals for an
investigation on the spot. Only reports from ICRC delegates could have
given the Committee the firsthand information needed to give its repre-
sentations the requisite authority; but it could not send delegates because
the North Vietnamese government refused all applications for visas made
to it.50

d) The fate of the American prisoners: although the ICRC has never admit-
ted to any connection between the fate of the American pilots and con-
demnation of the air attacks, and no document shows any formal
connection between them, one cannot help feeling that the ICRC con-
cluded that it could not take a stand on a question outside the scope of the Geneva Conventions as long as it was unable to do the work assigned to it by those Conventions. Furthermore, once the government of the Democratic Republic of Vietnam had announced that the ICRC would not be allowed to send a mission to Hanoi until it had condemned the American air raids, by condemning them the ICRC would have become an appendage of one of the parties to the conflict. Any condemnation of such attacks would have been perceived as the result of a deal with the Hanoi government, or as yielding to compulsion. In such circumstances, its pronouncements would have carried no weight whatsoever.

Whether these arguments sufficiently counter any objection is doubtful. Certainly, by putting pressure on the ICRC the Hanoi government tied the Committee’s hands and, if anything, prevented it from taking the public stand which that same government so strongly requested; nevertheless, the ICRC’s policy was open to objection on several counts, and showed a serious misjudgement of the legal position.

In this matter as in others, the International Committee tended to attach such undue importance to written law that it identified humanitarian law with the Conventions. The inevitable conclusion that a matter not regulated by the Conventions is not the subject of any rule is legally unsound, since any Convention is subject to the general principles underlying it; it is also incompatible with the ICRC’s humanitarian mandate.

With regard to the case in point, I would submit that, although the general principle that the civilian population shall be immune from the effects of hostilities had taken some hard knocks, it was not obsolete and it was the International Committee’s duty to say so. The ICRC was particularly well placed to stand firm on this principle since none of the parties to the Vietnam War disputed it.

The International Committee also ascribed undue importance to the distinction between the Law of Geneva and the Law of The Hague. However handy that distinction may be for analytical purposes, there is no clear-cut division between the two sets of rules. Many rules belong to both of them, including those restricting aerial bombardment: from the airman’s point of view they are part of the law applicable to means and methods of warfare and therefore of the Law of The Hague; but at ground level, considering the effects of bombing on non-combatants, they are no less certainly part of humanitarian law.

To sum up, in my opinion the International Committee would have been fully entitled to uphold the principle of immunity of the civilian population from the effects of hostilities. It was its duty to do so and to condemn the violations of that principle perpetrated by all parties to the Vietnam War. The ICRC ultimately came to similar conclusions in July 1972.
The appeals made by the ICRC on 17 July and 29 December 1972 with regard to the Vietnam War prepared the ground for similar action in subsequent conflicts, for example:

- the appeal of 9 October 1973 relating to the Yom Kippur war, in which the ICRC stressed ‘the necessity of sparing the civilian population in all circumstances’;53
- the press release of 7 July 1978 on the renewed fighting in Beirut, in which the ICRC strongly condemned ‘the deployment within a densely populated town of means of warfare leading to great loss of life among non-combatants’;54
- the appeal of 2 October 1978 in which the ICRC stated that it was ‘alarmed at the worsening situation in Lebanon’ and that ‘Beirut has again become the target of indiscriminate shelling’, and urgently appealed to the belligerents ‘to cease forthwith the indiscriminate shelling of the civilian population’;55
- the appeal of 19 March 1979 concerning attacks on the civilian population in Rhodesia/Zimbabwe;56
- the appeals of 7 June, 1 August and 18 September 1982 following the Israeli invasion of Lebanon;57
- the ICRC press release of 11 May 1983 on the Iran-Iraq conflict denouncing the indiscriminate bombardment of towns and villages as grave breaches of international humanitarian law, committed by both countries;58
- the press release of 4 November 1983 concerning the indiscriminate shelling of Tripoli (Lebanon);59
- the appeal of 7 June 1984 relating to the Iran-Iraq conflict, in which the ICRC denounced ‘the spiral of reprisals and counter-reprisals against the inhabitants of Iranian and Iraqi towns. In face of the new acts of violence deliberately aimed at civilian objectives, the ICRC calls upon Iran and Iraq to cease immediately their current bombardment of defenceless civilians’;60
- the statement of 28 May 1985 by the President of the ICRC, in which he denounced the resumption by Iraq of bombardments of the civilian population and the reprisals that followed, and solemnly called on the opposing forces ‘to put an end to these practices which cause intolerable suffering to innocent civilians’;61

The Gulf War was exceptional on two counts: not only was the outbreak of hostilities foreseeable, it was also virtually announced in advance. The ICRC used the six weeks between the Security Council’s adoption of Resolution 678 on 29 November 1990, authorizing the use of force to oblige Iraq to withdraw from Kuwait if it had not done so by 15 January 1991, and the expiry of that deadline to remind all the states concerned of their obligations under international humanitarian law. In a memorandum dated
30 November 1990, the ICRC stressed in particular the prohibition of attacks against civilian persons or objects, and the obligation to take all feasible precautions to avoid loss of civilian life or damage to civilian objects; it reminded the parties that the use of chemical and bacteriological weapons was prohibited and that the rules of the law of armed conflict also applied to weapons of mass destruction; lastly, the ICRC invited the states that were not party to Protocol I to respect Articles 54 (protection of objects indispensable to the survival of the civilian population), 55 (protection of the natural environment) and 56 (protection of works and installations containing dangerous forces), which stem from the basic principle of civilian immunity from attack. Special representations were made in Baghdad, on the one hand, and in Washington, London, Paris and Riyadh, on the other, as well as in Taef, home to the Kuwaiti government in exile. On 14 December 1990, the memorandum was sent to the 164 states party to the 1949 Geneva Conventions.63

The ICRC made renewed appeals on 17 January 1991, as the first missiles were falling on Iraq, and on 1 February 1991.64 This is evidence enough that the ICRC is qualified to make its voice heard on the subject. The next difficulty is to steer a middle course between the Scylla of ICRC admonitions too often repeated, so that they progressively lose all authority and all influence on the belligerents’ behaviour, and the Charybdis of excessive restraint, leading to accusations that the ICRC is not impartial. The ICRC would be accused of denouncing some breaches of the principle of the civilian population’s immunity from attack, while failing to denounce equally grave breaches in other circumstances. This is an operational problem for which legal analysis, unfortunately, provides no clear-cut solution. Only strict adherence to the principle of impartiality and a constant awareness of the long-term purpose of its work will enable the ICRC to avoid the hazards of an emotional response and maintain a line of conduct true to its humanitarian mission.

I-B. SPECIAL RULES PROTECTING THE CIVILIAN POPULATION

1. Introduction
The general principle that the civilian population shall be immune from the effects of hostilities does not prevent the adoption of special rules prescribing additional protection for persons and objects that particularly need or deserve it.

Four such sets of rules must be mentioned here. They relate to:

- protection of civilian wounded and sick, and civilian medical personnel and installations;
- protection of civil defence personnel and installations;
- truces and evacuations;
- safety zones.
These rules do not substitute for, but supplement the general obligation to respect and protect the civilian population, and are therefore practical examples of how that obligation should be fulfilled.\textsuperscript{65}

2. The protection of civilian wounded and sick and civilian medical personnel and installations

The principle that the wounded and sick shall be immune from attack is laid down in Article 16, paragraph 1, of the Fourth Convention: 'The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.' This provision, which applies to the entire civilian population of all parties to conflict, is supplemented by Article 10 of Protocol I:

All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

In non-international armed conflicts, the wounded and sick are protected by Article 3 of the 1949 Conventions, which stipulates that:

Persons taking no active part in the hostilities, including ... those placed \textit{hors de combat} by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely ....

The wounded and sick shall be collected and cared for.

Article 7 of Protocol II supplements these provisions as follows:

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Civilian hospitals and medical installations are protected in international armed conflicts by Article 18 of the Fourth Convention and Article 12 of Protocol I. In non-international armed conflicts this protection stems from the obligation of all warring parties to collect and care for the wounded and sick, for it would obviously be contrary to that obligation, and indeed unlawful, to attack hospitals or other medical installations, whether military or civilian, unless they were being used for particularly serious hostile acts. The obligation to respect civilian hospitals and medical establishments is confirmed by Article 11 of Protocol II, which must be regarded as restating the law in force. It reads:

Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit and after such warning has remained unheeded.

Article 20 of the Fourth Convention protects the staff of civilian hospitals but only regular hospital staff. Under the Geneva Conventions, civilian doctors and other medical personnel who are not regularly engaged in the running of a hospital are protected only by the general principle of civilian immunity from the effects of hostilities, and by Article 16, paragraph 2, of the Fourth Convention, which states:

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

In view of the risks run by civilian medical personnel in their humanitarian work during hostilities, these provisions could well seem inadequate. Article 15 of Protocol I corrected that anomaly.

In non-international armed conflicts the protection of civilian medical personnel follows from Article 3, which stipulates that the wounded and sick shall be collected and cared for. Protection is furthermore provided by Article 9 of Protocol II, which should also be regarded as restating the law in force. It reads:

Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

The principle of neutrality of medical care protects civilian medical personnel in the same way and to the same extent as medical personnel of the armed forces.

Lastly, civilian medical transports by land, sea and air are protected by Articles 21 and 22 of the Fourth Convention and Articles 21 to 31 of Protocol I. In internal conflicts that protection follows indirectly from Article 3 common to all four Conventions; it is also specifically laid down by Article 11 of Protocol II.66

The rules protecting civilian wounded and sick and civilian medical personnel and installations are thus closely aligned with those protecting their military counterparts.67 They do not mention the ICRC, for the good reason that the responsibility for protecting and caring for civilian wounded and sick lies with the medical services of the parties to conflict and to a lesser extent the National Red Cross and Red Crescent Societies, and it is they
who are covered by the immunities the Geneva Conventions provide for that purpose.

As in the case of wounded and sick members of the armed forces, the International Committee’s work for civilian wounded and sick and civilian medical personnel and installations will therefore be based on its right of humanitarian initiative. That work will now be reviewed.

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A humanitarian institution such as the ICRC cannot, as a matter of principle, make any distinction between military and civilian wounded and sick. All are war victims, and must be protected and cared for. The Committee’s work to protect civilian wounded and sick will therefore be almost identical with its work in aid of wounded and sick members of armed forces, which is described above.68

At the start of each new conflict the ICRC has accordingly reminded all concerned of the principle that the wounded and sick are inviolable. For example, in its appeal of 12 March 1948 on Palestine, of 31 October 1956 on the events in Hungary, and of 2 November 1956 on the Suez conflict it stressed that all wounded and sick, whether military or civilian, must be protected and cared for.69

It has likewise repeatedly called for respect for the emblem, which protects civilian hospitals as well as the armed forces’ medical installations.

The ICRC also dealt in identical fashion with complaints of violations of the principle that the wounded and sick shall be immune from attack, whether such complaints related to military or civilian wounded and sick. Such complaints were particularly numerous during the Vietnam War: the Democratic Republic of Vietnam repeatedly protested against the destruction of leper colonies, hospitals, clinics, and other civilian medical installations. In accordance with its customary practice, the ICRC passed on the North Vietnamese protests to the United States government, whose replies it transmitted to the authorities in Hanoi. The latter rejected the American proposals for an investigation on the spot.70

Furthermore, either party may ask the ICRC to notify the adverse party of the marking and location of hospitals and other civilian medical installations, so as to increase the effectiveness of their protection.

The Democratic Republic of Vietnam did not take up the ICRC’s offer of services for that purpose.71 In the Cyprus conflict, on the other hand, the ICRC passed on a list of the hospitals in Nicosia to the Turkish authorities, who confirmed that they had issued strict orders to their armed forces not to attack those medical facilities;72 similarly, in the Rhodesia/Zimbabwe conflict the ICRC gave all parties concerned a full list of hospitals and clinics throughout the country.73

In offering to make such notifications the ICRC was acting on its right of humanitarian initiative, as the Fourth Convention did not explicitly provide
for them. In international armed conflicts this matter is now regulated by Article 12, paragraph 3, of Protocol I, which invites the warring parties to notify each other of the location of their fixed medical units. However, even where notification is not given, they are still under the obligation to respect and protect medical units.

Although there is no such provision in Protocol II, it is perfectly legitimate to notify the location of civilian medical units in non-international armed conflicts too. Parties to any conflict are under an obligation to respect medical units, and the only purpose of notification is to give these better protection. The ICRC may also be asked to notify the use of civilian medical transports, in the same way as military medical transports.74

May the International Committee be requested to protect civilian medical installations not only by active diplomacy from Geneva, but also by being present on the spot?

This question has arisen on numerous occasions, and in particular at the start of the first Arab-Israeli conflict. As the end of the British mandate over Palestine on 15 May 1948 drew near, the Arab and Jewish medical personnel in government hospitals announced their intention, because of the growing insecurity, to leave their duties after the departure of the mandatory power. These hospitals were therefore liable to find themselves without staff just when war between the Arab and Jewish communities seemed inevitable.

On 5 January 1948 the British government asked the International Committee to dispatch doctors and nurses to take over the running of the hospitals and prevent the health service from breaking down. The ICRC sent out an evaluatory mission to Palestine to take stock of all the resources available, such as hospitals, clinics, laboratories, doctors, nursing staff and ambulances.

Obviously, the ICRC did not have the means to ensure the operation of a public health service, nor could it act in place of a government administration. Besides, that was not its role. It therefore concentrated on protecting hospitals and medical facilities. After obtaining formal assurances from all parties to the conflict that they would respect the fundamental humanitarian principles, it agreed to assume responsibility for protecting a number of hospitals. These it placed under the protection of its emblem and appointed a locally resident delegate or nurse to supervise them, who could confirm that they were not being used for hostile acts. It refused, however, to take over the administration of these hospitals, which was consequently entrusted to the respective Arab or Jewish municipalities or medical associations. The Arab and Jewish medical staff accepted these arrangements and agreed to carry on. In April 1948 the ICRC sent out eight delegates and ten hospital matrons who were assigned to the country’s main hospitals. These arrangements continued until armistice agreements were concluded more than a year later.

In this way the ICRC gave the main hospitals in Jerusalem, Bethlehem, Jaffa, Ramleh and Nazareth effective protection throughout the war by its intercession, its emblem and the active presence of its delegates. These
hospitals went on working even when fighting was raging around them and some of them were virtual enclaves in enemy territory. The ICRC also took charge of delivering most of their supplies, although at times they could only be reached by crossing enemy lines.

Thus, at the cost of great risks and sacrifices which it recognized and accepted, the ICRC managed to keep going a hospital network without which thousands of wounded and sick – Arabs and Jews, soldiers and civilians alike – would have had no assistance whatsoever.75

In the civil war in Cambodia (1970–5), medical teams from the Danish, Norwegian, Swedish and Belgian Red Cross Societies posted in the towns of Kompong Thom, Kompong Cham and Svay Rieng gave similar protection to the hospitals there.

With the consent of the Khmer authorities, these hospitals were declared to be ‘neutral zones’. The medical teams were made responsible for seeing that the rules governing neutral status were strictly observed and that no weapons were taken into the hospital premises, which were duly marked with the red cross emblem; the adverse party was notified that the hospitals had been given neutral status.

In practice, however, this initiative turned out to have serious disadvantages, for the fact that not all hospitals in Cambodia were declared ‘neutral zones’ could be taken to imply that those which had not were being used for non-medical purposes, and were therefore legitimate military objectives. So the ICRC decided to give up these arrangements, which in any case went far beyond its responsibilities under the Geneva Conventions.76

As a final but unforgettable example, in the civil war that tore Lebanon apart from 1975 to 1990 the ICRC delegation often saw to the protection, and in some instances the day-to-day running, of several hospitals in the most fiercely contested districts of Beirut, Tripoli, Sidon, Tyre and elsewhere. That these hospitals were able to carry on despite the violence and duration of the hostilities was largely due to the selfless dedication of ICRC delegates and of medical teams seconded to the ICRC by several National Red Cross Societies.77

3. The protection of civil defence personnel and installations

The fearsome threat of modern warfare induced governments to set up civil defence services to enable the civilian population to survive natural disasters and armed conflict.

Although they proved invaluable in the Second World War, especially in Great Britain and Germany, the Diplomatic Conference of 1949 gave them scant recognition. Thus Article 63, paragraph 2, of the Fourth Convention protects only civil defence services operating in occupied territory, and then only
against arbitrary action by the occupying power. The Geneva Conventions do not grant them any special protection from the dangers of war.

Yet in fire-fighting, rescuing the injured from the debris of collapsed buildings and giving them first-aid, distributing emergency relief to a civilian population terrified by bombing, and evacuating endangered civilians when fighting draws near, civil defence workers run much the same risks as medical personnel, and therefore have a moral right to the same kind of protection.

Several National Societies whose volunteers would be expected to work alongside the civil defence services in time of war were alarmed by this lack of protection. The International Committee, no less alarmed, consulted several commissions of experts on the subject and submitted two reports to the Twentieth and Twenty-first International Conferences of the Red Cross, recommending that civil defence personnel be given a special status. Both Conferences recognized the need to strengthen international legal protection for civil defence services, and requested the ICRC to continue its work in that field.

The question was then discussed by the Conferences of Government Experts meeting in Geneva in 1971 and 1972, and later by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law. The result was Articles 61 to 67 of Protocol I, confirming the obligation to respect and protect civilian civil defence organizations and their personnel (Article 62); stating the recognized rights of civil defence organizations in occupied territory (Article 63); providing for co-operation with civil defence organizations of neutral states and for international co-ordinating organizations (Article 64); specifying the circumstances that may lead to a cessation of protection (Article 65); laying down rules on identification methods and procedures (Article 66); and regulating the status of members of the armed forces assigned to civil defence organizations (Article 67).

To the best of my knowledge, these provisions have not yet led to any intervention by the ICRC. Should that prove necessary in future, there are several courses of action open to it. It could:

- draw attention to the law in force;
- pass on information relating to the identification of civil defence personnel and the whereabouts of their fixed installations such as shelters and stores;
- pass on information on co-operation by civil defence organizations of neutral states and on international co-ordinating organizations;
- transmit complaints of alleged violations of the provisions protecting civil defence organizations.

Lastly, and although this is no part of their duties, ICRC delegates and medical teams may be requested to help civil defence organizations to rescue and evacuate the injured and distribute emergency relief supplies. Unfortunately, ICRC delegates have more experience of such work than they ever wanted.
4. Truces and evacuations

Because of more advanced weaponry and more street fighting there are now many more civilian casualties than in previous wars. All too often civilian wounded cannot be rescued because they are lying between the firing lines or in combat zones. The plight of women, children and the elderly taking cover wherever they can is just as desperate.

Help must be given to them. Provision for it is made by Article 16, paragraph 2, of the Fourth Convention:

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Although this is a less specific and less forceful version of the corresponding provisions in the First and Second Conventions, it states just as clearly the principle that civilian wounded and sick and all other civilians exposed to grave danger must be protected and rescued, and that the belligerents must facilitate the efforts of their rescuers.

In addition, Article 10 of Protocol I stipulates that all the wounded and sick shall in all circumstances ‘be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition’. With regard to non-international armed conflicts, Article 3 of the Conventions states that ‘Persons taking no active part in the hostilities … shall in all circumstances be treated humanely’, and that ‘The wounded and sick shall be collected and cared for’. Article 8 of Protocol II furthermore provides that:

Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care ….

In practice it is just as difficult to apply these provisions as it is to rescue wounded and sick soldiers on the field of battle.

The enemy lines may be on the other side of the street, behind a few shattered walls. The local inhabitants have gone to ground in whatever shelter they can find in cellars and ruined buildings. Water supplies are cut off, food and medical supplies are almost exhausted, the wounded are not looked after, and the pounding of artillery and the staccato of machine-gun fire make it impossible to venture out. This can go on for days, weeks or months.

Without a truce or suspension of hostilities it will be virtually impossible to collect the wounded and evacuate civilians stranded in the combat zone. But there can be no truce unless the belligerents agree to it, and they are not likely to agree unless they have the help of a neutral intermediary. In such circumstances the ICRC, with its specific mandate to protect and assist war victims, will often be the intermediary best qualified to help. Since the ICRC is not
explicitly mentioned in the above provisions, it will once again use its right of humanitarian initiative to offer its services to the warring parties.

As in the case of wounded and sick military personnel, the ICRC will try to facilitate agreement on a suspension of hostilities. Delegates may also assist in marking out the cease-fire area, and may be asked to supervise evacuations so that neither adversary can exploit them to its own military advantage.81

The ICRC has considerable experience in this field. As a humanitarian institution it cannot make any distinction between civilian and military victims of hostilities, and most ICRC-assisted evacuations have therefore been concerned with both civilian and military wounded and sick in the course of, for instance:

- the numerous operations during the Palestine conflict (1948);
- the Bizerta affair (1961);
- the ICRC intervention in the Dominican Republic (1965);
- the events in Kisangani (1967);
- the civil war in Jordan (1970);
- the civil war in Nicaragua (1978–9);
- the civil war in Chad (1979–80).

These operations have already been described above,82 so there is no need to dwell on them again here.

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The evacuation of civilians from a besieged position raises legal problems of its own and must therefore be considered separately.83

It has always been accepted that a commander besieging a fortified position is under no obligation to allow the wounded and sick, and the women, children and old people to leave it.84 There have indeed been cases in which the besieger has taken pity on non-combatants and allowed them to leave and cross his lines, but in many more cases this measure of clemency was refused. All too often, civilians trying to flee a besieged place have been forced back into it.85

Belligerents invoked military necessity to justify this harsh treatment, for the more mouths the beleaguered garrison had to feed, the sooner it would consume its stocks of food and water and have to lay down its arms. But it was nonetheless extremely cruel to the civilians there, obliging them to share the fate of the garrison and suffer all the privations, hunger, deficiency diseases and bombardment, not to mention the hazards of the final assault. Non-combatants often fared worse than the defenders, whose commander tended to keep what food there was for his soldiers. Civilians got no more than crumbs.

Although cruel, this custom has existed from time immemorial and belligerents have not been prepared to give it up. The Diplomatic Conference of 1949 did not feel able to abolish it, and therefore adopted what was little more than a recommendation. Article 17 of the Fourth Convention thus reads:
The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases ....

In plain terms, this provision requires the officers commanding either side to examine in good faith any proposals to evacuate the wounded, sick, infirm and aged, children and maternity cases, and to make such proposals themselves if they see fit. It does not oblige them to allow any such evacuation if they believe that they have good reason to object to it.

In non-international armed conflicts, Article 3 of the 1949 Conventions requires that ‘Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely’. This general principle may be used to propose the evacuation of wounded and the civilian population from a besieged area, the belligerents being under no obligation to agree to the proposal if they believe that they have good reason not to. There is, then, no great difference on this point between the rules for international and for non-international armed conflicts.

These provisions do not mention the International Committee. However, there can be no cease-fire and no evacuation of non-combatants from a besieged area unless the belligerents agree. In many cases it will be difficult to reach agreement without the help of a neutral intermediary, and the ICRC is often the intermediary best qualified to bring about such an agreement.

So in this case, too, the International Committee will have to base its activities on its right of humanitarian initiative.

Even so, it is ill-equipped to overcome the security and logistic difficulties of evacuating the wounded and the civilian population from a besieged area. Moreover, the commander of the besieging forces is unlikely to authorize acts of clemency before forcing his enemy to capitulate. It is therefore not surprising that the ICRC has limited practical experience in this respect. Nevertheless, a few examples may be given.

During the Palestine conflict (1948) the ICRC delegation was requested on several occasions to evacuate non-combatants who were trapped in a besieged area. Its most remarkable operation was unquestionably the evacuation of the civilian population from the Jewish quarter of the Old City of Jerusalem.

The Jewish quarter, at the foot of the Wailing Wall in the heart of the Old City, was besieged on all sides by the Arab Legion, who could take cover behind the ramparts built by Soliman the Magnificent but were themselves besieged on three sides by the Jewish troops holding the New City.

Towards the end of May it became clear that the resistance of the Jewish quarter was wearing thin. The ICRC delegation again opened negotiations for the evacuation of non-combatants, but agreement was reached only in the last extremity. The defenders of the Jewish quarter surrendered on 28 May. The next day, about 2000 women, children and elderly people and 140 wounded were handed over to the ICRC, which evacuated them to the
New City held by the Israeli forces. The combatants were transferred to a prisoner-of-war camp and treated as prisoners of war.\textsuperscript{87}

Similarly, the day after the attack on Jaffa the ICRC delegation asked the Israeli authorities to allow the Arab civilian population to be evacuated, with the result that more than 30,000 people were permitted to cross the Jewish lines, over a distance of about 10 kilometres, and go into the Arab zone where they wished to take shelter.\textsuperscript{88}

The ICRC delegation subsequently carried out the evacuation on 18 June 1948 of about 1100 Arab women, children and elderly from the Israeli-controlled area and transported them to Arab-controlled Tulkarem.\textsuperscript{89}

The largest number of requests for the ICRC to arrange for the evacuation of besieged civilians came during the civil war in Lebanon (1975–90). Since each little town and village in this patchwork of different communities had been turned into a miniature stronghold and heavy weapons were lacking, siege warfare, which had been little used in modern war, returned to favour.

In such circumstances, the trapped civilian population and the wounded inevitably suffer most. The ICRC therefore did all it could to evacuate them from the most threatened areas. From 1975 onwards its delegates organized many such operations in aid of non-combatants from all communities.

The most remarkable was without doubt the evacuation of displaced persons from Deir-el-Kamar. There were many Christian villages in the Chouf mountains, a mainly Druze region of Lebanon. During the fighting of September 1983 their inhabitants fled to Deir-el-Kamar, and by the time the Druzes tightened their grip on the little town it had more refugees than local inhabitants. Living conditions there were terrible owing to the lack of food, blankets, housing, medicines and medical care. The ICRC took in several convoys of relief supplies, but the only real way to improve the situation was to evacuate much of the population.

After obtaining the consent of all parties, the ICRC organized a series of five convoys between 1 and 8 November 1983 and evacuated 990 children and elderly and several dozen wounded and sick to Beirut. Another 5130 people were evacuated to Beirut and Sidon in further operations between 15 and 22 December 1983. For these operations the ICRC delegation, ably backed by the Lebanese Red Cross, not only negotiated with all parties concerned but also provided relief supplies and transport vehicles; considerable logistic problems had to be overcome in exceptionally difficult conditions.\textsuperscript{90}

These few examples show the various tasks the ICRC may be required to undertake in order to evacuate the civilian population from a besieged area.

First of all, it may lend its good offices to bring about an agreement between the belligerents. It may do so at the request of either party, or may itself take the initiative of submitting any proposals it believes may help civilian war victims.

The ICRC may also be required to be present as a neutral intermediary at the place appointed for the evacuation, for any orderly evacuation presup-
poses a suspension of hostilities. Experience has shown that it is often necessary for neutral observers to be present, since the parties may not otherwise trust each other sufficiently to abide by the pledges they have given.

Article 44, paragraph 3, of the First Geneva Convention entitles the ICRC to use its emblem to indicate the truce and mark out the area set aside for the evacuation. ICRC delegates may furthermore be required to supervise parts of the operation, for example to check the identity of the evacuees, any items transported and the condition of the vehicles used, it being understood that the ICRC can take no responsibility for the parties' commitments to each other and that the success of any such operation ultimately depends on their good faith.

Finally, and although this certainly goes beyond its role as a neutral intermediary, the ICRC has often had to deal with some or all of the logistic aspects of the operation.

5. Safety zones

From time immemorial efforts have been made to circumscribe the horrors of war by barring acts of violence from certain places. The Greek city-states recognized the great Pan-Hellenic sanctuaries as sacred and inviolable («εροί καὶ ὁμολογίας»). No act of violence might be committed there; they were places of refuge for the civilian population, fugitives and defeated armies.91

In medieval Europe the Church had always insisted on the right of asylum in monasteries, churches and chapels, where the local population could find temporary refuge and whence no one could be removed by force.92 Similar rules, usually of religious inspiration, are recorded in most civilizations.

The institution of sanctuary disappeared from the modern law of war as shaped by the conflicts of the seventeenth and eighteenth centuries. There is no trace of it in the draft convention prepared by the Brussels Conference of 1874 or in the Hague Regulations of 1899 and 1907.

This is not surprising: since the general principle of non-combatant immunity from the effects of hostilities prohibited any attack on the civilian population or civilian objects, there was no longer any need for particular places to have special immunity. All undefended localities had to be spared from attack; places of refuge were therefore considered unnecessary.

Interest in such places was revived, however, as a result of the First World War. Not only had the very idea of a non-defended locality been undermined; above all, air warfare had proved to be a grave danger for non-combatants in general, both at the front and well behind the lines.

Between the two world wars, several draft conventions for the establishment of hospital or safety zones were prepared under the auspices of private associations or the International Committee. In general they proposed fairly permanent places of refuge, preferably far from the front, in which certain categories of non-combatants could find shelter. These places were to be
strictly supervised and guaranteed special protection by agreements between the belligerents.

However, these drafts did not lead to the conclusion of hard-and-fast conventions.\textsuperscript{93}

The ICRC's various approaches to the belligerents during the Second World War, calling for the establishment of safety zones, likewise had no effect.\textsuperscript{94} Many observers would have concluded that such proposals were bound to fail and should be abandoned, but for three noteworthy precedents.

\textit{The siege of Madrid 1936}

It will be remembered that during the siege of Madrid in 1936 the ICRC took up a proposal first made by General Franco that an area of Madrid be recognized as a neutral zone not to be used for military purposes, and that as many as possible of the non-combatant civilian population should be assembled there. The Burgos (Nationalist) authorities agreed that the area contained between Calle de Zurbano and the New Ministries to the west, Paseo de Ronda to the north, the part of Calle de Velasquez between Goya and Ronda to the east, and Goya and Genova streets to the south be declared neutral. The Valencia (Republican) government rejected this proposal, arguing that to group the civilian population together in a particular part of Madrid might strengthen the belief that the rest of the capital could be regarded as a war zone; it held that the whole population of Madrid should be considered as non-combatant and should therefore be spared. Although no agreement was reached between the warring parties, the Nationalist government confirmed that it would respect the immunity of the proposed neutral zone, and did indeed refrain from attacking it.\textsuperscript{95}

\textit{Neutral zone in Shanghai 1937}

After breaking through the Chinese front in October 1937 the Japanese armies converged on Shanghai in a pincer movement from the north and south, driving before them a flood of refugees. The district of Chapei, to the north of the foreign concessions and already the scene of fierce fighting in 1932, was again laid waste. At this point a French missionary, Father Jacquinot de Besange, took the initiative of proposing that a neutralized zone be established in the old district of Nantao, adjoining the French concession, to offer refuge to the civilian population. His representations to the belligerents were successful and they signed matching declarations, the Chinese forces undertaking to evacuate the neutral area and the Japanese authorities undertaking not to attack it. A supervisory committee composed of seven neutral members was formed to control, administer and police the neutral zone. These arrangements came into force on 9 September 1937. Although fighting raged in the neighbouring districts, the neutralized zone was strictly respected. On 15 November, completely surrounded, it came under the control of the Japanese military authorities. The supervisory committee con-
tinued, however, to administer and police it until the situation in the Shanghai region returned to normal, and went on with its relief operations in aid of destitute refugees. Thanks to Father Jacquinot, over a quarter of a million people were shielded from the fierce fighting that devastated the other districts of Shanghai.96

Safety zones in Palestine 1948

Safety zones controlled by the ICRC and placed under its responsibility were established for the first time during the conflict in Palestine.

From the moment the United Nations adopted the plan for the partition of Palestine, it was clear that fighting would break out when the mandatory power withdrew on 15 May 1948 as announced. The area most coveted – and most seriously threatened – was obviously Jerusalem, with its Arab and Jewish population of 150,000.

On 24 March the ICRC delegate, who had been in Palestine for several weeks, proposed that safety zones be established in which the civilian population could find refuge in case of need.

Shortly before the negotiations were finalized, another much more ambitious proposal was made that the whole of Jerusalem should be declared neutral and considered as a safety zone placed under the protection of the red cross emblem.

The idea was that the Arab and Jewish authorities would continue to be responsible for their respective zones and for seeing that it was totally demilitarized. All combatants were to leave the city. The ICRC delegation was to ensure ‘to the greatest possible degree’ that these stipulations were respected.97

Until the very last minute there was still hope that this plan would succeed and that the battle for Jerusalem would be avoided, but the extremists on both sides dispelled any such illusions by launching their attack without waiting for the British authorities to leave. The ICRC delegation could only fall back on its more modest plan of establishing smaller safety zones, to which all the belligerents had already agreed in principle.

On 13 May 1948 the ICRC delegation announced that three safety zones had been established:

- Zone I, buildings and grounds of the King David Hotel, the YMCA (Young Men’s Christian Association) building and the Terra Santa Convent;
- Zone II, buildings and grounds of Government House (the headquarters of the British mandate administration), the Arab College and the Jewish Agricultural School;
- Zone III, buildings and grounds of the Italian School and the Italian Hospital.

It was agreed that the neutralized buildings and grounds would be indicated and their limits clearly shown by means of the red cross emblem; that
only women, children and the aged, without distinction of race, religion or nationality, would be admitted to the safety zones; and that they would be given only temporary asylum, while fighting was actually taking place. The ICRC was to be responsible for the general supervision of the safety zones. The Arab and Jewish authorities agreed to these arrangements.

In fact, Zone III never really came into existence, as it was occupied by Israeli forces from 15 May on. There were no refugees there. The absence of any ICRC delegate at the time probably explains this *fait accompli*, but the responsibility of those who took over the safety zone remains undiminished. The ICRC flag was lowered and that was the end of Zone III.

Zone I, where the ICRC delegation had its office, was respected until the first truce came into force on 11 June 1948, when the United Nations Mediator requested the use of the King David Hotel for his staff. With the consent of the Arab and Israeli authorities the delegation handed over the premises to him, but fighting began again on 8 July. That same day the United Nations staff left the King David Hotel, which was immediately occupied by Israeli forces and thus became a military objective. Realizing that the other buildings no longer gave sufficient protection, the ICRC could only announce that Zone I would cease to exist on 22 July, after the last refugees there had been evacuated and the buildings restored to their proper owners.

The neutrality of Zone II was generally respected in spite of a serious incident in August 1948. In October, realizing that there was no longer any need for this zone, the ICRC ended it and, with the agreement of the parties to the conflict, handed over Government House to the United Nations Truce Supervision Organization (UNTSO), which still occupies it.

Thus, in spite of several incidents such as are inevitable in time of war, Zones I and II were respected throughout the battle for Jerusalem, largely because the ICRC kept one or more delegates, assisted by dedicated nurses, permanently in each. Their effective supervision of the zones gave the belligerents a firm guarantee that they were being used only for their proper purpose.

Thanks to these arrangements, dozens of civilians were able to take temporary refuge there from the fighting. Moreover, the existence of the safety zones made the delegation’s other activities, especially movements of persons and relief supplies, much easier.

Thus experience in Madrid, Shanghai and Jerusalem showed that safety zones which the belligerents undertook to respect and where non-combatants could find shelter from the effects of hostilities were a practical possibility which it would have been irresponsible to neglect when preparing to revise the humanitarian conventions.

These achievements, however, were not in line with the ICRC’s proposals, which were based on the conclusions of the Conferences of Experts it had consulted and recommended relatively permanent safety zones far from the front, whereas in practice temporary safety zones had been established at the scene of the fighting.
It would have been preferable to provide for both concepts in an article couched in sufficiently general terms to cover all possibilities, but it was found more convenient to continue with two separate provisions. The result was Articles 14 and 15 of the Fourth Convention:

**ARTICLE 14**

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

**ARTICLE 15**

Any Party to the conflict may, either direct or through a neutral state or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

(a) wounded and sick combatants or non-combatants;
(b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.\(^{104}\)

Although the Conventions do not give an official definition, it may be useful to specify the usual terminology, as follows:

- **Hospital zones and localities** are reserved for military and civilian wounded and sick, and for the medical and administrative staff of such zones.
- **Safety zones and localities** may be established outside the combat zone and are reserved solely for the infirm, old people, children under fifteen, expectant mothers and mothers of children aged under seven.
- **Hospital and safety zones and localities** are a combination of hospital zones and localities and safety zones and localities.
- **Neutralized zones** are established in the actual combat zone to protect both combatant and non-combatant wounded and sick, as well as civilians
who are not taking part in the hostilities or engaging in an activity of a military character during their stay in such zones, from nearby military operations.

- **Place of refuge** is a term commonly used to denote any piece of territory so laid out as to afford shelter to certain categories of persons, and recognized as such. It may therefore cover hospital zones and localities, safety zones and neutralized zones.\(^{105}\) Since the time this definition was formulated, the term ‘safety zone’ has come to be used in the same general sense.

Article 14 of the Fourth Convention is supplemented by a draft agreement on hospital and safety zones and localities\(^{106}\) on the lines of Article 23 and Annex I of the First Convention (described above in relation to the protection of wounded and sick members of armed forces).\(^{107}\) The only major difference relates to marking: whereas provision is made for hospital zones and localities reserved solely for military and civilian wounded or sick to be indicated by the red cross or red crescent emblem on a white ground,\(^{108}\) it is recommended that hospital and safety zones be marked by oblique red bands on a white ground, placed on the buildings and outer precincts.\(^{109}\)

Commentators have devoted much space to the differences – which are purely theoretical and have no practical effect whatever – between hospital zones and localities, safety zones and localities, and neutralized zones. It would perhaps be more useful to point out the characteristics common to all the various places of refuge mentioned in the First and Fourth Conventions.

The arrangements prescribed are all temporary. They may be of longer or shorter duration, depending upon the wishes of the parties to the conflict, but they have no effect after the end of active hostilities. The present status of Government House in Jerusalem does not invalidate this conclusion, since that status was not conferred by the arrangements for the establishment of neutralized zones, but because all the belligerents agreed to hand over the building to the United Nations once it ceased to form part of a neutralized zone.

The said arrangements always relate to zones of limited area, perhaps a large easily recognizable building or group of buildings, or a locality or group of localities, but never more than a small part of the territory belonging to or occupied by the belligerents, for safety zones may not contain any important military objective.

The purpose of these arrangements is to give additional legal protection to persons who are particularly vulnerable or particularly deserving of it, namely military and civilian wounded and sick, the medical and administrative personnel of the zones, and civilians taking no direct or indirect part in military operations or in the production of war material.

The arrangements are always contractual ones: a zone established in accordance with the Conventions does not qualify for the special protection they prescribe unless it is recognized by the adverse party. It is the parties’ mutual agreement that gives a zone its special status as a safety zone and confers the resultant legal protection upon it.
This special status entails three obligations: that of making no military use of the area or any installations therein; that of refraining from any hostile act against the area; and that of taking all reasonable care not to endanger the area or anyone in it when attacking nearby objectives.

Belligerents cannot of course be expected to refrain from attacking military objectives in the immediate vicinity of a safety zone merely because in spite of all their precautions, the attack might indirectly endanger persons who have taken refuge there. A safety zone should therefore never be established or maintained next to an important military objective, as the fate of Zone I in Jerusalem goes to show.

Since hospital and safety zones and neutralized zones derive their status as safety zones, and their consequent entitlement to special protection, from an agreement between parties to the conflict, it may well be asked what purpose is served by Articles 14 and 15 of the Fourth Convention and Article 23 of the First Convention. But no one at the 1949 Conference suggested abolishing them, for the good reason that they do confer a presumption of legality on any proposal based on their provisions. A belligerent that feels it has sufficient justification to reject such a proposal is under no obligation to accept it, but must at least examine it in good faith and is responsible for the consequences of its refusal.

Arrangements for the establishment and recognition of safety zones do not affect the legal status of the areas or a belligerent’s rights of sovereignty over them, because the status of safety zones is temporary and solely for humanitarian purposes. There had been so many encroachments on China since the Opium War that it was felt necessary to specify this in the agreements on the safety zone in Shanghai. It was not done in the other cases because the point was self-evident.

Lastly, the establishment of safety zones enjoying special protection in no way weakens the protection conferred by international law on non-combatants in general. Sets of rules providing special protection do not invalidate the general principle that non-combatants shall be immune from attack. The establishment of safety zones is no excuse for indiscriminate destruction and attacks on the civilian population outside those zones. The Sixteenth International Conference of the Red Cross unequivocally reaffirmed this principle, which underlies all rules relating to safety zones and has lost none of its validity.

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Strictly speaking, Articles 14 and 15 of the Fourth Convention apply ipso jure only to international armed conflicts; but they must be considered as special rules implementing the general principle of non-combatant immunity from attack. This principle applies in all armed conflicts, international or otherwise.

Moreover, Article 3 common to all four 1949 Geneva Conventions stipulates that persons taking no active part in hostilities must in all circumstances
be treated humanely, and that parties to a conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of those Conventions. Since belligerents in a non-international armed conflict are thus invited to agree to establish safety zones and apply other provisions of the Conventions, there is no fundamental difference on this point between the systems of protection applicable in international and non-international armed conflicts.

* *

To what extent can the International Committee promote the establishment and recognition of safety zones?

Clearly, the ICRC can be asked to pass on all proposals for the institution of safety zones, since Articles 14 and 15 of the Fourth Convention expressly invite it to do so. Equally clearly, it can take the initiative and make its own proposals. Its power to do so is inherent in the good offices referred to in Article 14, paragraph 3, of the Fourth Convention and, more generally speaking, in the ICRC’s universally recognized right of humanitarian initiative.

Besides, the establishment and recognition of safety zones require some form of inspection to ensure that the undertakings given are being honoured, for no belligerent will pledge to respect safety zones unless it is sure that the enemy will not be able to use them as a cover for hostile acts.

Annex I of the First and Fourth Conventions has consequently provided for inspection by special commissions whose members must be given free access to the various zones at all times and may even reside there permanently.112 Where no such commissions have been appointed, the belligerents are free to ask the Protecting Powers or the International Committee to carry out the inspection. The ICRC is also free to offer its services for that purpose, on the understanding that it cannot use force to put an end to any breaches of covenant it may find and can only ascertain the facts and state whether or not the undertakings given have been fulfilled.

These conclusions are confirmed by the practice of the ICRC, which is described below.

Alarmed by the escalation of air attacks on the Democratic Republic of Vietnam, the ICRC, in its letter of 8 July 1966, proposed the creation of safety zones or neutralized zones to shelter the most vulnerable members of the population from the effects of hostilities.

Drawing attention to the First and Fourth Conventions and Resolution XXVIII of the Twentieth International Conference of the Red Cross (Vienna, 1965), but expressing no opinion on attacks on other objectives, the ICRC offered its services to help in setting up such zones.

The North Vietnamese authorities, which were demanding an end to the bombing, did not deem it necessary to reply to the ICRC’s proposal.113
The ICRC reiterated its proposals once more on 8 May 1972, but again to no avail.\textsuperscript{114}

In the spring of 1971 an extremely brutal civil war broke out in East Pakistan between the Pakistan army and the Bangladesh liberation movements. In December 1971 the Indian army intervened on the side of the insurgents. The result was the break-up of Pakistan and the emergence of the new state of Bangladesh. What began as an internal conflict became another war between India and Pakistan, and the confusion was compounded by the presence on both sides of paramilitary and irregular forces.

The two ICRC delegates posted in Dacca were particularly alarmed because there was every indication that the Pakistan army would entrench itself in Dacca, on which the Indian forces were converging, that there would be fierce fighting in that densely populated city, and that a terrible revenge would be taken for the atrocities of the past few months.

The ICRC delegates therefore proposed that there should be two neutralized zones, the Holy Family Hospital and the Hotel Intercontinental. The Indian and Bangladesh authorities undertook to respect these zones, and after obtaining the local consent of the Pakistan High Command the ICRC delegation took charge of them on 9 December 1971.

With the efficient support of the League of Red Cross Societies, a Swiss Red Cross team and a number of foreign correspondents, the ICRC delegates established strict control over the neutralized zones. The Pakistani forces evacuated two positions with the approval of their superiors, the buildings were searched from top to bottom, all weapons were impounded and a strict watch was kept on comings and goings.

The delegation rescinded the neutral status of the zones on 19 December 1971, three days after the end of hostilities; the buildings and people in them thereafter came under the protection and supervision of the Indian army.

More than a thousand wounded and civilians, many of them former senior Pakistani government officials in terror of their lives, found temporary refuge in those two safety zones,\textsuperscript{115} which were strictly respected when Dacca was captured.

Soon after the coup d'état of 15 July 1974 in Nicosia which toppled President Makarios, Turkish forces landed in Cyprus and fierce fighting ensued in the north of the island. With the cease-fire of 22 July negotiations began in Geneva, but hostilities suddenly resumed on 14 August.

The ICRC delegation thereupon took the initiative of setting up three neutral zones in Nicosia, consisting of the building and grounds of the Hilton Hotel, the Hotel Cleopatra and a nearby clinic. On that same day the ICRC received assurances from the belligerents that they would respect the neutral zones and that the civilian population could take refuge there. Special arrangements were also made to mark and protect hospitals. The ICRC took
charge of the neutral zones, which were strictly respected. About 2000 people found shelter there.\textsuperscript{116}

In the spring of 1975 the days of the Khmer Republic were numbered. As the Khmer Rouge closed in on the capital, which was practically cut off from the rest of the world, the whole structure of government was disintegrating. On 1 April the President of the Republic, Marshal Lon Nol, fled; on 12 April the United States evacuated its embassy; on 14 April the airport fell into insurgent hands, and on 16 April the debacle was complete.

Well before the final rout, the ICRC delegates had offered to turn the Hotel Phnom (formerly the Royal Hotel) buildings, where they had set up their emergency base, into a hospital and safety zone for wounded and civilians. It was not until 16 April at noon, however, that the Republican authorities finally gave their consent. At 2 p.m. the neutralized zone was opened, and by nightfall it had taken in more than 2000 Cambodian and foreign refugees. Meanwhile the ICRC in Geneva was moving heaven and earth to obtain the consent of the Khmer Rouge as well, but in vain.

What came next is well known. When the victorious Khmer Rouge forces entered Phnom Penh on 17 April they ordered the immediate evacuation of the entire population, including the sick, the aged, maternity cases and war casualties. No exception was made.

Obviously it did not suit the new rulers to have a neutralized zone in which more than 2000 people had taken refuge. At 5.30 p.m. the Khmer Rouge forces ordered the neutralized zone to be evacuated at once. The foreigners, including the ICRC delegates, had to seek asylum in the French embassy; they were evacuated to Thailand a fortnight later. The Cambodian nationals fell into the hands of the Khmer Rouge.\textsuperscript{117} Their fate was sealed.

When the Somoza regime collapsed on 17 July 1979, the President of the Nicaraguan Red Cross appealed for churches, Latin American embassies, hospitals and reception centres for displaced persons to be declared neutral zones under the protection of the Nicaraguan Red Cross and the International Red Cross; they were to be respected by all armed persons, who were not to enter them without laying down their weapons. Hoping to prevent a final bloodletting, the ICRC delegate agreed to endorse this appeal.

On 18 and 19 July 1979 thousands of people, including many National Guard officers and soldiers, took refuge in churches, hospitals and Nicaraguan Red Cross buildings in Managua and the provinces. Another 1500 fugitives were stranded at the airport which, being of strategic importance, could not be declared a neutralized zone. But near the airport there were huge empty warehouses forming part of the \textit{zona franca} – the free port. It was agreed to turn these buildings into a neutralized zone controlled by the Nicaraguan Red Cross and the ICRC, and to transfer there the fugitives at the airport and in other makeshift shelters. Thousands of people were rescued and protected by this means in the final throes of the expiring regime.
On 23 July, however, the new authorities decided to arrest all the men in the zona franca and other places of refuge. The Nicaraguan Red Cross and the ICRC were allowed to take the women and children back to their homes, but the men were thrown into prison, where the ICRC did its best to give them as much help as it had previously given the enemies of the old regime. Most of these men were eventually sentenced to long terms of imprisonment, and they accused the Nicaraguan Red Cross and the ICRC of handing them over to the Sandinista authorities after enjoining them to lay down their arms. This painful situation was not resolved until February 1990, when the prisoners were given an amnesty.

On 21 March 1980, civil war again broke out in the capital of Chad, N’Djamena. Street fighting caused heavy civilian and military casualties. Deeply concerned, the ICRC appealed to both sides to settle their differences at the earliest possible moment. It called for the Central Hospital, where most of the civilian and military wounded had been taken, and the surrounding buildings to be declared a neutralized zone immune from attack, whose perimeter would be marked by flags; the ICRC itself would ensure that no military installations or armed men were allowed in it. The ICRC also called for a 48-hour cease-fire to allow its delegates to evacuate civilians trapped in the combat zone.

The two parties agreed and the hospital was declared neutral the next day, but the truce was not respected.

In June 1980 the situation deteriorated still further and the ICRC was obliged to withdraw its medical teams from the N’Djamena hospital to Kousseri on the Cameroon side of the Chari River.

As soon as the Falkland Islands conflict (April–June 1982) began, the ICRC sought to ensure the protection of the civilian population and offered its services to help in setting up neutral or safety zones, but the naval blockade and the lack of means of transport prevented the ICRC delegates from reaching the capital of the archipelago (Port Stanley/Puerto Argentino) until 10 and 11 June. They saw at once that most of the houses in the town offered no protection against firearms, being built of wood, and that evacuation was impossible. The only stone building easily recognizable from all sides was the Anglican cathedral.

On the basis of Article 15 of the Fourth Convention the ICRC proposed that the cathedral and the surrounding buildings should be declared a neutral zone where the wounded and sick and the civilian population could take refuge. The Argentine and United Kingdom governments at once agreed, but a cease-fire soon after made the proposed arrangements unnecessary.

The fierce fighting of November 1983 in Tripoli (Lebanon) took a very heavy toll among the civilian population. On 5 November the ICRC delegation established and took charge of a neutral zone comprising the Islamic
Hospital, whose capacity it doubled by installing additional equipment, and the adjoining Franco-Lebanese School, which was converted into a post-operative centre.

These arrangements enabled the hospital to carry on and to attend to the casualties caused by the violent clashes between rival factions.¹²²

Numerous conclusions can be drawn from the above examples.

Whereas the conferences of experts that were consulted during the inter-war period recommended fairly permanent safety zones far from the field of battle, in practice safety zones were always temporary and situated in the combat area itself. In all recorded instances, they were based on exceptional arrangements designed to cope with the emergency of fierce fighting in an urban locality.

They were non-permanent because of the purpose of safety zones, which was to protect non-combatants from the violence of warfare, or in other words to give them purely temporary protection from what was expected to be a passing danger. There was never any question of giving lasting protection against the consequences of victory or defeat to people taking refuge in these areas, or of removing them from the jurisdiction of the warring party that had authority over the area. The fate of the men who took refuge in the *zona franca* in Managua had shown that this had to be clearly understood, and that care had to be taken not to raise hopes that could only be bitterly disappointed. In this context the term ‘extraterritoriality’, which crops up as readily as weeds in texts about safety zones, is incorrect and should be given short shrift.

Although Articles 14 and 15 of the Fourth Convention provide for the belligerents to take the initiative in proposing to establish safety zones, in practice the decisive step has always been taken by a third party which, except in the case of the Shanghai zone and the Nicaraguan zones, has always been the International Committee.

However, even though the initiative of a third party may be decisive in bringing safety zones into being, only the agreement of the parties to conflict can give them a legal existence and the protection this confers. The unrelenting cruelty that put an end to the ill-fated Phnom Penh neutralized zone makes this clear.

Articles 14 and 15 of the Fourth Convention do not give the same answer to the thorny question of who may be allowed to enter a safety zone. Article 14 provides that hospital and safety zones shall be open to the wounded and sick and to a few categories of civilians, namely the infirm, aged persons, children under fifteen, expectant mothers and mothers of children under seven. Article 15 provides that neutralized zones shall be open to all civilians who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.
It will not be easy to enforce these distinctions in practice, nor to refuse to allow people who do not belong to these categories to enter a safety zone whenever they believe that they are in grave danger.

The key criterion is abstention from any political or military activity. Thus, the ICRC delegates posted in Dacca did not admit the ministers or certain senior officials of the government of East Pakistan to the neutralized zone until they resigned from their high offices and undertook to abstain from any political or military activity whilst they were in the zone. Any such undertaking obviously has to cover the entire duration of the respective person’s stay, which must be uninterrupted. Repeated entries must be absolutely banned.

The Geneva Conventions do not say whether combatants who have laid down their arms could be admitted to a safety zone, but soldiers on the losing side may well be the people most seriously threatened by the settling of scores that is all too often a feature of major political upheavals. If refused entry to a safety zone they might force their way in at bayonet point.

The final decision on their admission will lie with the parties to the conflict. If the belligerents agree that former combatants may be allowed into a safety zone there would seem to be no reason why the ICRC should object; but if the belligerents do not so agree, it cannot possibly override their opposition.

In any case, former combatants must never be allowed into a safety zone before laying down their arms and undertaking to abstain from any military activity. That undertaking must be final and they must be fully aware that admission to a safety zone will not protect them from the consequences of the inevitable surrender.

It is essential to mark a safety zone, for this is the outward and visible sign of its neutral status and of the protection it enjoys. Safety zones must therefore comprise buildings that can be immediately identified, and the perimeter of the protected area must be clearly marked on the ground. In practice it has always been marked with the red cross emblem.

Inspection is equally indispensable, for no belligerent will undertake to respect a safety zone unless it is sure that the enemy cannot use it as a base for operations. Experience shows that safety zones cannot be established and recognized as such unless they are efficiently inspected. Except in Shanghai and Nicaragua, this has always been done by the ICRC.

The extent to which safety zones can be efficiently inspected determines how far the International Committee can assume responsibility for them. Indeed, it would be totally unacceptable for any belligerent to be able to use a safety zone for which the ICRC was responsible in order to gain a military advantage, even if the ICRC did not know of this misuse.

Seen in this light, the plan to declare the whole of Jerusalem neutral is frightening. The proposal was after all that the Arab and Jewish zones should be demilitarized by their own civilian authorities and that the ICRC delegation should ensure ‘to the greatest possible degree’ that these stipulations were respected.
There is no suggestion here that either side lacked good faith, or the delegates' competence, but can anyone seriously believe that either belligerent could long have resisted the temptation to take advantage of such loose commitments and capture the Holy City by a surprise attack that it would justify as a pre-emptive strike? The battle for Jerusalem would not have been avoided, and with it would have come all the atrocities prompted by fury and resentment at such a breach of faith. That hazardous scheme would have put an end to the authority of the ICRC and to respect for the law of war.

Before leaving the subject of safety zones mention should be made of various plans for buffer zones, under the control and responsibility of the ICRC, in areas of heightened international tension. Proposals of this kind, sometimes designating such zones as 'safe havens' or 'neutralized zones', have been made on several occasions, in particular for the Israeli-Lebanese border in 1970 and the Khmer-Thai border in 1979–80. However similar these terms are to those used in Articles 14 and 15 of the Fourth Convention, they envisage a radically different approach. It is one thing to set non-combatants apart from the fighting without much obstructing military operations, but quite another to stop enemies from coming to blows when they are spoiling for a fight. Anyone who comes between two belligerents is asking for trouble unless he is strong enough to command respect.

Here as elsewhere, war imposes constraints on the International Committee that it would be courting disaster to ignore. However generous its intentions, it would be inexcusable for it to do so. Nor has it ever lost sight of them, as the ICRC's practice shows.

It may be objected that as things stand, Articles 14 and 15 of the Fourth Convention are of little use and therefore do not merit such lengthy analysis, since they have helped no more than a few hundred refugees in Dacca, a few thousand in Nicosia, and so forth.

The objection would be unfounded. The value of a safety zone cannot be measured solely by the number of people finding refuge there. It is no less important that because of such zones, ICRC delegations and those of other relief organizations have been able to stay put and carry on their humanitarian work in spite of the violence of war.

Lastly, and perhaps most important of all, the existence of a safety zone is tangible evidence, obvious to combatants and non-combatants alike, that bounds can be set to violence. The moderating influence of an area thus protected extends far beyond its borders.

* * *

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law did not modify the system of safety zones provided for by the Geneva Conventions of 1949. It did, however, introduce two new categories of localities and zones granted special protection.
In the first of these, the Conference attempted to reinstate the old concept of non-defended locality, but drastically changed its meaning. Under customary law and Article 25 of the Hague Regulations, the ban on attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended is applicable in all circumstances. This prohibition applies to any undefended locality simply and solely because it is undefended; no special convention or declaration is required. In contrast, although Article 59 of Protocol I begins with a reminder that it is prohibited to attack non-defended localities, it goes on to give this term a different connotation, namely of entitlement to special protection depending on an over-complicated system of declarations which have to be submitted to the adverse party for acceptance or rejection.

‘There is no worse mistake than to change the meaning of words’ as Confucius might have said. The Diplomatic Conference did not bother itself with this maxim.

Secondly, in Article 60 of Protocol I the Diplomatic Conference allowed for the establishment of demilitarized zones. They resemble the neutralized zones provided for by Article 15 of the Fourth Convention, but unlike them can be established outside or inside the combat zone.

The new provisions have not yet been put to the test. If zones under special protection are established in future on the basis of Articles 59 or 60 of Protocol I, and if the ICRC is asked to co-operate in implementing these provisions, it might be entrusted with tasks similar to those described above and subject to the same constraints and limitations.

Conclusions

‘When horses fight, it’s the grass that suffers’, says a French proverb; and when armies clash, the civilian population is the first to suffer from the violence unleashed.

Industrial development, more powerful armaments and changing methods of warfare are claiming an ever greater proportion of civilian victims. The International Committee deplores this trend; it cannot stop it.

It can, however, do its best to see that peaceful civilian populations suffer as little as possible. This it can do in two ways: by reminding the belligerents of their obligation to respect the general principle that the civilian population must not be harmed, and by lending a helping hand in all kinds of limited operations that add up to improved conditions for civilian victims of war.

Both ways are necessary for the ICRC’s work to succeed. Yet two pitfalls must be avoided: abstract moralizing for which it would soon be called starry-eyed and impractical, and short-sighted activism. The ICRC’s declarations of principle carry weight largely because of the part it takes in good sound practical work. Conversely, it is those principles that ensure, to a large extent, the effectiveness of ICRC operations.
The very nature of war narrowly and inexorably restricts the International Committee’s ability to act, but within the limits thus imposed its opportunities for action are real. Events confirm as much, even though the Committee has not entirely overcome the theoretical difficulties of protecting the civilian population against the effects of hostilities.

The time has come for the International Committee to realize to the full its responsibilities towards a peaceful population and the many ways in which it can come to their aid.

Notes


3 ‘The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves ... shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war’, Hague Regulations of 18 October 1907, Article 2.


21 Resolution XXIV of the Seventeenth Conference (Stockholm 1948); Resolution XVIII of the Eighteenth Conference (Toronto, 1952); Resolution XVIII of the Ninetieth Conference (New Delhi, 1957); Resolution XXVIII of the Twentieth Conference (Vienna, 1965); Resolution XIV of the Twenty-first Conference, (Istanbul, 1967); Resolution XIV of the Twenty-second Conference (Teheran, 1973); Resolution XII of the Twenty-third Conference (Bucharest 1977); Resolution XIII of the Twenty-fourth Conference (Manila, 1981).
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31 The Twentieth International Conference categorically rejected a British proposal that Resolution XXVIII should apply only to international armed conflicts. XXth International Conference of the Red Cross, Vienna, October 2–9, 1965, Report, pp. 84–7. For Resolution IX of the Sixteenth Conference, see: Sixteenth International Red Cross Conference, London, June 1938, Report, pp. 75–6 and 103; also p. 281 above.

32 The Committee’s general efforts to restore the principle of immunity of the civilian population from attack are described in the preceding section. The present section therefore deals only with its work in specific conflicts.

33 RICR, English supplement, no. 5, May 1948, p. 86.


37 IRRC, no. 53, August 1965, p. 418.


39 Ibid., pp. 584–5.

40 ICRC Archives, file 202 (69)-III, passim.

41 ICRC Archives, file 202 (69)-I and 202 (69)-III, passim. The Saigon government also denounced attacks by North Vietnamese or National Liberation Front (Vietcong) forces on the civilian population of South Vietnam (minutes of the meeting between Mr Phan-Huy-Quat and Mr Durand on 18 February 1965, ICRC Archives, file 202 (69)-I). The National Liberation Front practically refused to have anything to do with the ICRC.


44 Note from the President of the ICRC to the United States Secretary of State, 27 September 1965, ICRC Archives, file 202 (69)-III.


48 Minutes of the plenary session of 22 June 1966, page 3. The ICRC’s representations of 17 July and 29 December 1972 should be read in the light of the conclusions of the Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law, which went a long way towards confirming the general principle that the civilian population should be immune from the effects of hostilities.

49 Minutes of the Presidential Council, 18 May 1966, p. 5; minutes of the plenary session of 6 and 7 July 1966, p. 6; minutes of the plenary session of 11 May 1967, p. 6; Annual Report 1967, pp. 21–2; minutes of the Presidential Council, 13 July 1972, p. 6.

50 Minutes of the meeting between Mr Vo-Van-Sung and Mr J.-P. Maunoir, 26 October 1965, ICRC Archives, File 202 (69)-I; minutes of the Presidential Council, 1 July 1966; report on the meeting between the President of the ICRC and the Ambassador of the Democratic Republic of Vietnam in Moscow, Document SP 577 annexed to the minutes of
the plenary session of 6 July 1966, p. 17; letter from the President of the ICRC to Mrs Isabelle Blume, President of the World Council of Peace, 4 April 1967, ICRC Archives, File 202 (69)-III; Document D 1094, September 1969, ICRC Archives, File 202 (69)-Ia.
51 Ibid.
52 Of course, the International Committee could not condemn air raids as such, as the law of war does not forbid aerial bombardment of military objectives provided care is taken that the civilian population is not unduly endangered. What it could condemn was the indiscriminate nature of those raids, at least over certain periods. This was, I think, sufficiently demonstrated by the great quantity of bombs dropped in those periods, and by the attacks by fleets of heavy bombers flying too high to identify their objectives accurately.
55 IRRC, no. 209, March–April 1979, pp. 85–90.
58 Press release no. 1474, 4 November 1983.
64 For a more detailed examination of this subject, see Part III, Chapter I, above, pp. 470–97.
65 The relevant provisions of the Additional Protocols apply equally to military and civilian wounded and sick.
66 ICRC practice is more fully described in Part III, Chapter I, above; to avoid undue repetition only a cursory account will be given here.
69 Ibid., p. 413.
71 IRRC, no. 200, November 1977, p. 479.
72 Fourth Convention, Articles 21 and 22; Protocol I, Articles 9 and 24–31.
75 ICRC Archives, files 202 (175) and 203 (175).

For definitions see Article 61 of Protocol I. References for the legislative history of these articles are given in the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, pp. 389–425.

See Book II, Part III, Chapter I, Section 4, above, pp. 484–93.


Fauchille, Traité de Droit international public, pp. 144–5.


RICH, English supplement, no. 6, June 1948, p. 103.


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96 Report by Dr Calame, ICRC delegate in Shanghai, 15 March 1938, ICRC Archives, file CR 217, file II (box 244); 347th Circular to Central Committees, 25 May 1938, RICR, no. 233, May 1938, pp. 463–72; The Story of 'The Jacquinot Zone', Shanghai, China, NCDN, Shanghai, 1938 (ICRC Library, ref. 362.1/98); Durand, From Sarajevo to Hiroshima, pp. 374–5.

97 Hospital Localities and Safety Zones, pp. 24–6.


99 Ibid, p. 28.

100 Ibid., pp. 29–36.

101 The ICRC delegation had made arrangements to accommodate several thousand refugees at a time, but for various reasons only a small fraction of that number took refuge in the neutral zones.


106 Fourth Convention, Annex I.

107 See Book II, Part III, Chapter I, Section 3, above, pp. 480–4.

108 First Convention, Article 6 of Annex I; Fourth Convention, Article 6, paragraph 2, of Annex I.

109 Fourth Convention, Article 6, paragraph 1, of Annex I.

110 Proclamation on the establishment of the neutral zone in Nantao, 3 November 1937, The Story of 'The Jacquinot Zone', Shanghai, China, p. 34; RICR, no. 233, May 1938, pp. 469–70.

112 Article 8 of Annex I, First and Fourth Conventions.
113 Letter from the President of the ICRC to Dr Vu Dinh Tung, President of the Red Cross of the Democratic Republic of Vietnam, 8 July 1966, ICRC Archives, file 202 (69)-III; IRRC, no. 65, August 1966, pp. 401–2; Annual Report 1966, pp. 16 and 19.
118 ICRC Archives, file 203 (93) and 231 (93) – 1979; Annual Report 1979, p. 31.
119 In all 1645 prisoners, mainly former members of the National Guard, were released on 17 March 1989; thirty-nine others were kept in prison. Keesing’s Record of World Events, March 1989, p. 36521. These thirty-nine prisoners, all former members of the National Guard, were released on 9 February 1990. Keesing’s Record of World Events, February 1990, p. 37237.

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CHAPTER II

FROM FAMILY MESSAGES TO REUNIFICATION OF DISPERSED FAMILIES

Il y a, pour la Croix-Rouge, la lutte contre toutes les souffrances matérielles qu’engendre la guerre. Il y a aussi, parmi tant de séparations et de drames, la lutte contre le silence, contre l’absence qui se prolonge, et qui use et détruit.

Nations, like individuals, live through mutual relations that flourish in peace: the flow of goods and services, the interchange of ideas, the movement of people from one country to another. Businessmen, traders, artisans, teachers and household staff settle and work in a foreign land. Others take up their abode there for family reasons such as marriages between people of different nationalities, or are temporarily resident or in transit as seasonal workers, students, commercial travellers, journalists or tourists.

Then war breaks out, and from one day to another these foreigners are labelled enemy aliens. Even if they escape internment, they are subject to severe restrictions in that same country which had offered them hospitality. And war cuts them off from their country of origin, severing their ties with home and with their loved ones.

Occupation has similar effects, subjecting entire populations to the dominance of an enemy power and cutting them off from neighbouring countries, or marking a deep divide within a single state when only part of it is occupied. Occupation does not imply any transfer of sovereignty, but it is a de facto situation that can last for months or years.

War and occupation destroy family life for thousands of people. Postal and telegraph services are disrupted, visits and meetings are forbidden, and close relatives who may have left each other for only a few days or weeks are kept apart by a barrier more formidable than mountains or oceans: a firing line.

Can the ICRC’s Central Tracing Agency come to their aid by trying to restore the vital links between family members separated by war, as it does for prisoners of war and their families?

People who have been arrested, interned or assigned to forced residence will of course be in greatest need of the Central Tracing Agency’s services.
Their names and addresses and all other particulars needed for their identification will have to be sent to the detaining power’s National Information Bureau, which will pass them on to the Central Tracing Agency. Its task is to centralize all such information and forward it to the home country of the persons concerned, except in cases where such transmission might be detrimental to them or to their relatives. The Agency may also be asked by families to enquire about persons taken into custody, especially those of whom there is no news or whose whereabouts are unknown, and given family messages, documents or valuables to be forwarded to them or their relatives. These activities have been described above, and there is no need to revert to them here.¹

The Geneva Conventions do not provide for the general registration of protected persons whose liberty has not been restricted. On the whole, there are not sufficient grounds for registering such people, except children to be evacuated.

All the conflicts of the twentieth century have tragically underscored the need for special measures to protect children against the dangers, privations and trauma of modern war. One such measure is to evacuate children most at risk, as well as orphans and children separated from their parents, to parts of the national territory well away from the fighting, or to safety zones or neutral countries. Extreme care must be taken, however, to register their identity and make sure that in due course they can be returned to their parents or legal guardians. Hence the provisions of Article 24 of the Fourth Convention and Article 78 of Protocol I: in order to facilitate the return of evacuated children to their families, the authorities of the party to the conflict which is arranging for their evacuation to a foreign country and the authorities of the receiving country must establish for each child a card bearing photographs of it and all information needed to identify it, and must send the cards and photographs to the Central Tracing Agency for safekeeping.²

The work of the Central Tracing Agency with regard to other protected persons, namely aliens in enemy territory and the population of occupied territory, and more generally speaking the entire civilian population of the parties to the conflict, will be concerned primarily with passing on family news and reuniting dispersed families.

The outbreak of hostilities suspends postal and telecommunication services between the warring parties, henceforth divided by a formidable barrier of fire and steel. The rift is even more keenly felt when the front cuts the country into two, crossing provinces, severing links between neighbouring villages and sometimes even running through cities or towns, so that thousands of people can no longer keep in touch with each other at the very time when their gnawing anxiety is most acute.
As early as the First World War the ICRC strove to provide a family news service for the civilian population, particularly those cruelly isolated by enemy occupation, but its efforts were of little avail because the belligerents obstructed all correspondence with enemy countries. Indeed, some areas were completely cut off from the outside world throughout the war.3

The first civilian family message service was established by the ICRC during the Spanish Civil War. Because the war broke out in the middle of summer, when thousands of people had left the cities and towns to escape the extreme heat, the number of families split apart by Spain’s division into two hostile zones was all the greater. As any direct communication between the two halves of Spain was absolutely forbidden, the ICRC set up a family message service via Geneva; to avoid overstraining the censorship system each message was restricted to twenty-five words. Only strictly personal news was allowed. Local sections of the Spanish Red Cross collected the messages and sent them to the nearest ICRC delegation, which in turn sent them to Geneva. From there they were forwarded to the other zone. When a message could not be delivered, the local section of the Spanish Red Cross or the ICRC delegation tried to find out what had become of the addressee. The messages were transmitted free of charge in both halves of Spain. No provision had been made for this civilian message service in the Madrid and Burgos agreements on ICRC activities in Spain, but because it met a need it developed of its own accord and grew beyond all expectations, for the International Committee forwarded over five million civilian messages in all from one zone to the other.4

At the beginning of the Second World War the ICRC received thousands of letters with the request to send them on to civilians in enemy territory. It was not authorized to do so, and as their transcription onto official forms would have taken too long, the ICRC offered to reintroduce a family message service similar to that of the Spanish Civil War. Most of the belligerents accepted this proposal. The National Societies printed message forms to the standard design suggested by the ICRC, collected the completed forms, sent them to Geneva and delivered them in the country of destination. Whenever a message could not be delivered, the ICRC asked for enquiries to be made. Civilian messages were also used to communicate between the two parts of a country divided by the front line, as in Italy between the Allied landings in the summer of 1943 and the end of the war. Although there was no mention of any such service in the Conventions and some governments were reluctant to allow it, it grew to a considerable size: in all, the ICRC forwarded nearly 24 million civilian family messages, which were delivered by National Societies and other relief organizations.5

Such was the origin of the civilian message service. It is now regulated by Article 25 of the Fourth Geneva Convention as follows:

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their
families, wherever they may be, and to receive news from them. This correspon-
dence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange
family correspondence by the ordinary post, the Parties to the conflict concerned
shall apply to a neutral intermediary, such as the Central Agency provided for in
Article 140, and shall decide in consultation with it how to ensure the fulfilment of
their obligations under the best possible conditions, in particular with the co-
operation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence,
such restrictions shall be confined to the compulsory use of standard forms con-
taining twenty-five freely chosen words, and to the limitation of the number of
these forms despatched to one each month.

It must be stressed that this article is to be found in Part II of the
Convention; it consequently applies to all the civilian population in the ter-
ritory of the belligerents or in occupied territory, as is indeed confirmed by
its first paragraph. The right to give or receive news of a strictly personal
nature is laid down as an inalienable right to which no exceptions can be
made. Parties to a conflict are therefore obliged not to hinder the exercise
of this right and to ensure that civilian correspondence is forwarded speed-
ily and without undue delay. Moreover, whenever circumstances make it
difficult or impossible to exchange family correspondence – as is inevitable
when war severs communications and closes borders – they must call on the
services of a neutral intermediary such as the Central Tracing Agency.

Thus, provided that family correspondence can be maintained through
bilateral contacts or with the co-operation of the postal authorities of a
third country or any other suitable neutral intermediary, parties to a conflict
are under no obligation to apply to the Central Tracing Agency, but they
must on the contrary do so or accept its offers of services if this condition is
not fulfilled.6

Article 3 of the 1949 Conventions does not contain any specific provision
for the forwarding of family news in non-international armed conflicts. Protocol II gives persons deprived of their liberty the right to receive cards
and letters,7 but gives no such right to persons whose liberty has not been
restricted. However, there is no legal gap, for the exchange of family news is
one of the measures designed to safeguard family unity, which is universally
recognized as being the natural and fundamental group unit of society and
entitled to protection by society and the state.8 In addition, Protocol II stipu-
lates that all appropriate steps shall be taken to facilitate the reunion of fam-
ilies temporarily separated;9 obviously, the exchange of family news is one of
the most important of these steps. In a non-international armed conflict the
ICRC can therefore offer to set up a family message service by virtue of the
inalienable rights of the family, its own universally recognized right of
humanitarian initiative and the fundamental principle of humanity enshrined
in Article 3 of the 1949 Geneva Conventions and Article 4 of Protocol II.

Experience during the Spanish Civil War, the conflict in Lebanon,10 the civil
wars in Chad and Uganda and many other internal conflicts has amply demonstrated the value of such a service.

In practice, however, it is usually much more difficult than one would imagine to set up a civilian family message service. It is usually not enough to forward the messages collected by one side’s postal service to the other side. Lazy and sometimes deliberately obstructive censorship services constantly have to be prodded into action, and all the difficulties of severed lines of communication and the general chaos of war have to be overcome. For example, for days and weeks after the Arab-Israeli war of June 1967, the cases and sacks containing the first bundles of family messages to and from inhabitants of the territories just occupied by Israel and their relatives in the Arab countries were carried by ICRC delegates on their backs from one side of the River Jordan to the other. All the bridges had been blown up and the delegates had to wade through knee-deep water to cross the river. In this way some 45,000 messages were forwarded in the month of June alone; at the end of July the total exceeded 100,000, and by the end of the year it had risen to nearly half a million.

The ICRC has often had to collect and distribute civilian family messages itself. After the war between India and Pakistan in December 1971, the ICRC delegation in Bangladesh set up a special service to deliver messages to Bihari refugees and forward messages from them, as the Bangladeshi postal services did not deliver mail in the refugee camps. The ICRC therefore had to set up what was in effect a postal service in conditions of appalling confusion, since most of the refugees had no address and many had no domicile. With the help and hard work of dedicated local staff that service collected, sorted, forwarded and delivered 2,803,000 family messages between 1972 and 1975.

Neither the Fourth Geneva Convention nor the Universal Postal Convention states that family messages between civilians who have not been deprived of liberty shall be exempt from postal charges. Parties to a conflict are therefore entitled to charge normal postage for correspondence of this kind sent by post, but when in accordance with Article 25, paragraph 3, of the Fourth Convention they have ordered the use of a standard form containing twenty-five words, also known as a ‘Red Cross Message’, they have usually made no charge for forwarding these messages, especially when they bear the red cross or red crescent emblem.

All family messages forwarded by national information bureaux and the Central Tracing Agency enjoy free postage in accordance with Article 141 of the Fourth Convention.

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Not only does modern war raise new barriers between people, it also uproots large sections of the civilian population – people who flee the fighting or whose homes are destroyed by bombing or shellfire, others who are torn away from their homes at a moment’s notice and join the mass exodus on the
roads, and the long weary lines of prisoners, internees and deportees. Some of these people may return home once the storm dies down, but many of them never do.

At the end of the Second World War the number of people who fled for one reason or another, euphemistically called 'displaced persons', was estimated at 30 million.\textsuperscript{16} Counting prisoners of war, internees, deportees, forced labour conscripts and survivors of the hell of the concentration camps, more than fifty million people were uprooted, and obliged to leave their homes by battle, terror, force or captivity. Perhaps half of them never saw their country again. Never before had there been such huge population movements in so short a time. Never before had war and terror caused migration in such monstrous disorder.

Population movements in the conflicts since the Second World War have been no less tragic. Take for example the migrations following the partition of the Indian Empire, the exodus of Palestinian refugees in 1948 and 1967 and of Jewish refugees after the 1948 war, Hungarian refugees in 1956, and Czechoslovak refugees in 1968, the flight of Algerian refugees from 1955 to 1962 followed by the sudden uprooting of French settlers from Algeria, the plight of the Bengali refugees in 1971, the exile of Chilean dissidents in 1973, the unending flow of Indo-Chinese boat people from 1975 on, and the interminable ordeal of African and Afghan refugees.

Countless families are split up in hasty flight from their homes without plan, provision or destination, in nightmarish disorder. If they lose sight of each other for only a few moments, if an air-raid warning causes a frantic rush for shelter or there is a wave of panic when the enemy appears, they are parted by a surge of the crowd and carried into the unknown. As Renée-Marguerite Frick-Cramer wrote in 1944:

\begin{quote}
like autumn leaves before the wind, parents and children, husbands and wives, brothers and sisters are swept away from each other by a jostling crowd and scattered to the four corners of the earth without hope of ever finding each other again in this immense chaos.\textsuperscript{17}
\end{quote}

So long as these migrations are confined to the national territory, as in the French civilian exodus of June 1940, official and private national organizations can come to the aid of members of dispersed families and help them to get in touch with each other again. But not if there is a national border or a front line between them. They will then need the help of an international organization.

The International Committee was the obvious choice. Ever since the Franco-Prussian War of 1870 it had worked to restore contact between prisoners of war and their loved ones. Through the services of its Central Agency it could equally well try to bring families dispersed by war together again.

The first initiative to do so was taken during the First World War. The Civilian Section of the International Prisoners of War Agency made countless efforts of all kinds to reunite dispersed families. The results, though limited,
were nevertheless remarkable, for there were no treaty provisions on which the Agency could base its work and tremendous difficulties to be overcome.\textsuperscript{18}

The ICRC again sought to reunite families during the Spanish Civil War, with results unfortunately far short of those it might justifiably have expected from the work of its delegations and of the Agency.\textsuperscript{19}

This work was resumed on a much larger scale in the Second World War. At the end of 1943, foreseeing what was in store once the fighting was over, the ICRC proposed circulating registration cards enabling any displaced person anywhere, and all members of dispersed families, to register with the Central Agency for Prisoners of War. General registration of displaced persons would certainly have produced tallies in sufficient number to answer thousands of enquiries.\textsuperscript{20} To be of any use, however, registration had to be general and systematic, whereas the Allied authorities would not authorize it in occupied Germany. Their refusal made the whole scheme pointless, and the ICRC gave it up.\textsuperscript{21} The national services of the Central Agency for Prisoners of War nevertheless handled tens of thousands of enquiries about members of dispersed families.\textsuperscript{22} In addition, shortly after the war the ICRC helped to set up an extensive family reunification programme for ethnic Germans (\textit{Volksdeutsche}) who were expelled from Central and Eastern Europe and the Balkan Peninsula when the German armies retreated.\textsuperscript{23}

The ordeal of separation suffered by millions of people during the Second World War, and the difficulties encountered by organizations trying to help families dispersed by the war, gave rise to several important provisions in the Fourth Geneva Convention.

Thus the purpose of Article 49 is to keep the family intact in the event of transfer or evacuation. It prohibits any deportation of protected persons out of occupied territory, restricts transfers and evacuations of civilian populations within a given territory, and stipulates that ‘the Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, ... that members of the same family are not separated’.

In order to keep families intact when protected persons are interned, Article 82 states that

\begin{quote}
members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of [penal and disciplinary] provisions,
\end{quote}

and that ‘Internees may request that their children who are left at liberty without parental care shall be interned with them’.

Lastly, Article 134 stipulates that ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation’.

Despite these precautions many families will unfortunately be split up, for example in a mass flight of the civilian population. The question of reuniting
families dispersed by the war will then arise. It is regulated by Article 26 of the Fourth Convention:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

This article requires belligerents to do two things. First, they must facilitate enquiries by members of families dispersed by the war who are seeking to renew contact with one another and if possible to meet. To fulfil this obligation the parties to a conflict may open national information bureaux on displaced persons, grant such persons facilities for correspondence, notify them of changes of address recorded by post offices and other competent authorities, and, if necessary, grant entry or exit visas for them to rejoin close relatives. Secondly, belligerents must encourage the work of organizations engaged in the task of reuniting families dispersed by the war. The National Red Cross and Red Crescent Societies and the Central Tracing Agency evidently have a particularly important part to play. At the request of the British delegation, the 1949 Diplomatic Conference added the requirement that these organizations must be acceptable to the parties to the conflict. The only purpose of this condition is to prevent partisan organizations from engaging in political activities under the guise of family reunification; it therefore could not be used to prevent the work of a humanitarian institution universally recognized as impartial, such as the ICRC.

The ICRC and the Central Tracing Agency can help in three ways to reunite members of families dispersed by war. The first is to help members of displaced families to resume contact by forwarding their mail and trying to trace missing persons, which is an essential preliminary to attempting to reunite families. The enquiries may be difficult, because they will relate to a period of utter chaos when entire populations are displaced and scattered far and wide by the ebb and flow of hostilities, so that even the officials who normally register and keep track of the civilian population are overwhelmed by the enormity of their task. And whereas in enquiries about prisoners of war the Agency can use a prisoner’s army, regimental, personal or serial number – a reliable and exact means of identification – and the lists the belligerents must send to it, displaced civilians have no such number and are usually not systematically registered in any way. For them there will have to be innumerable individual enquiries, every clue and every possibility will have to be explored and queries repeated again and again, often with all-too-disappointing results. It is especially difficult to trace young children; far more than could ever be imagined are separated from their families when the tidal wave of war engulfs a civilian population. Article 24 of the Fourth Convention accordingly states that ‘The Parties to the conflict ... shall endeavour to arrange for all children under
twelve to be identified by the wearing of identity discs, or by some other means’. To be effective this provision should be applied in advance, in peacetime;\textsuperscript{25} but to the best of my knowledge no state has taken steps to do so.

Secondly, the ICRC’s good offices may be sought to help bring about agreements enabling members of families dispersed by war and separated by national borders or demarcation lines to be reunited. In some cases, its task will consist only of general moves to foster an understanding between the belligerents and facilitate the necessary arrangements, the actual handling of individual cases being entrusted to other bodies. In others, however, the ICRC or the Central Tracing Agency may be asked to register individual applications themselves, submit them to the appropriate authorities in order to obtain entry or exit visas, and if necessary issue travel documents for persons allowed to rejoin their families.\textsuperscript{26}

Lastly, the ICRC may be requested to give its own and its delegates’ help in family reunifications requiring the presence of a neutral intermediary to enable the persons concerned to cross demarcation or cease-fire lines.

Thus Article 26 of the Fourth Convention, whilst not mentioning the International Committee, gives it a basis for various activities that the ICRC and the Central Tracing Agency have never failed to undertake in the past. However, their good offices under that provision are such that a sensitive question can arise, namely the line to take if the parties differ as to the country in which the families should be reunited.

This arose, for instance, with regard to the exodus of Hungarian refugees in October and November 1956. Parents who had stayed behind in Hungary demanded that their children who had found asylum abroad should be returned to them, whereas parents who had fled abroad demanded that the children they had left in Hungary should join them.

At the request of the Hungarian authorities and the authorities in several host countries the International Committee agreed to use its good offices to resolve this painful issue. After collecting all available information the ICRC submitted a plan to the Hungarian government to reunite families either in Hungary or abroad, according to the freely expressed wish of the head of the family. Reuniting was to be on an individual and voluntary basis.

The Hungarian government did not accept this proposal. Whilst recognizing that the problem of emigration should also be settled, it considered that priority should be given to the repatriation to Hungary of child refugees abroad.

In these circumstances the ICRC had to give up its efforts to find a general solution, but continued to monitor the individual cases referred to it.\textsuperscript{27}

The question of principle had nevertheless been raised. It was settled by the Nineteenth International Conference of the Red Cross (New Delhi, 1957), which in Resolution no. XX urged all National Societies and governments to facilitate by every means the reunion of persons, both adults and children, with their families in accordance with the wishes of such persons, and in the case of
minor children in accordance with the wishes of the recognized head of the family no matter where domiciled. This was the policy adopted by the ICRC when it was again faced with this question.

After the Middle East conflict of 1967 the International Committee was heavily engaged in all three activities described above: in making enquiries to locate missing members of families, lending its good offices and reuniting families.

To restore contact between members of families dispersed by the war, the ICRC set up a family message service linking Israel and the occupied territories with the Arab states. Within the first six months this service forwarded as many as 450,000 family messages; three years after the war the number had risen to 1,300,000. The Central Tracing Agency and ICRC delegations also conducted enquiries to locate missing civilians. Over a period of three years 9272 individual search files were opened; 5771 persons were successfully traced, 2804 cases were closed with the mention ‘unknown, missing or dead’, and on 30 May 1970 the remaining 697 tracing requests were still pending.

The ICRC furthermore opened negotiations with all the relevant authorities to establish procedures for reuniting families dispersed by the war. Although it achieved far less than it had hoped, largely because of the parties’ intransigence and the restrictive criteria ill-suited to Arab extended families that were applied by the Israeli authorities, its efforts were nevertheless successful in several practical respects.

For the occupied territories of the West Bank, for instance, the ICRC played a decisive part in setting up procedures to reunite families, but did not usually deal with individual cases. Requests for family reunification were normally submitted to the occupying authorities by relatives who had stayed behind in occupied territory, the ICRC intervening only in cases deemed worthy of priority because of their especially tragic character.

On the other hand, all individual requests concerning the Gaza Strip and Sinai were processed via the ICRC delegations. Thus, a Palestinian national wishing to rejoin his family in the Gaza Strip could apply to the ICRC delegation in Cairo, which then notified the ICRC delegation in Gaza; the latter saw to all the formalities with the competent authorities, whose decision was made known to the applicant through the same channels. Family reunifications on the Golan Heights were similarly dealt with through the ICRC’s Damascus and Kuneitra delegations.

The ICRC also played an active part in reuniting families at the Suez Canal and on the Golan Heights.

For the Gaza Strip and Sinai the ICRC delegations in Cairo and Gaza, with the co-operation of the Egyptian and Israeli authorities, normally organized the reuniting of a family every six to eight weeks; the meeting place was El Qantara. Luggage was inspected and loaded the night before departure, and
at dawn on the agreed day the delegates checked the names of the authorized persons, who then boarded buses supplied by the competent authorities. At the appointed time the delegates and the passengers they were escorting arrived at opposite sides of the Suez Canal, which had been closed to seagoing vessels since June 1967. The two groups of passengers were ferried across the Canal in turn, several at a time, in small launches provided by the Egyptian authorities, and were reunited with their families the same evening, either in the occupied territories or in the Nile Valley.  

Until the cease-fire of 7 August 1970 came into force, a truce lasting several hours had to be concluded for each of these operations and a sector of about 40 kilometres between Ismailia and El Qantara had to be temporarily declared neutral. In spite of several regrettable incidents for which each side blamed the other, there were no casualties either among the ICRC delegates or among the civilians rejoining their relatives.

These operations were suspended for several months after the October 1973 conflict. The ICRC resumed them on 20 March 1974, no longer across the Suez Canal but in the United Nations buffer zone. The Israeli authorities put an end to this procedure in July 1975.

Between October 1967 and June 1975 ICRC delegates organized seventy-eight operations of this kind, reuniting more than 9200 persons with their families on either side of the cease-fire lines. For people wishing to return to the Golan Heights, twenty-seven operations were carried out by ICRC delegates at Ahmedieh on the Damascus-Kuneitra road, in the middle of the no man’s land between the Syrian and Israeli armies. In all, 672 people were thus able to rejoin their families.

The exact number of persons reunited with their families in the occupied territories of the West Bank thanks to the procedures recommended by the ICRC is not known, as the ICRC itself did not monitor the handling of most of the individual cases or the operations for crossing the cease-fire lines. It is, however, estimated at several thousand.

The ICRC again performed the same three tasks – tracing members of families, negotiating family reunifications and taking active part in them – on a large scale in the Cyprus conflict of summer 1974. The occupation of northern Cyprus by Turkish forces led to the exodus of most of the Greek Cypriot population, whilst intercommunal clashes turned Turkish Cypriot villages scattered over the southern part of the island into strongholds besieged by Greek Cypriot forces. Countless families from both communities were torn apart.

To restore contact between them, the ICRC immediately set up a family message service. Some 140,000 messages were distributed within three months and more than half a million messages by the end of the year, thanks to the co-operation of the Cyprus Red Cross and an extensive network of correspondents linking all communities. It was indeed for many months the only mail service available to the population of Cyprus, hence the high number of messages exchanged not only between the north and the south of the island but also with other countries.
The Agency was also flooded with requests to trace missing persons. In less than three months it opened more than 36,000 enquiries and successfully resolved almost half of them by 15 October 1974. It could never have done so without the valuable help of the Cypriot radio service which day after day broadcast lists of missing persons.\(^40\)

In addition, the ICRC took active part in intercommunal negotiations for the transfer of people from one area to another and made its delegates’ services available to help in crossing cease-fire lines. Thus the ICRC delegation arranged for 1571 Greek Cypriots stranded in the villages of Turkish-controlled northern Cyprus to be transferred to the south. Most of them were invalids and elderly people, who would not or could not leave their homes when the Turkish forces landed, had been left behind in the headlong flight of the Greek Cypriot population, and had since been living in dreadful conditions, neglected and destitute. They were reunited with their families in the south of the island.\(^41\)

In response to proposals by the ICRC, the leaders of the Greek Cypriot and Turkish Cypriot communities agreed on 30 November 1974 to transfer certain categories of civilians – the wounded and sick who could not be given appropriate care in the area in which they were living, elderly persons, children and pregnant women – from the north to the south, and vice versa. In all, 716 Turkish Cypriots were transferred to the northern area and 505 Greek Cypriots to the southern area before the agreement was terminated on 27 January 1975.\(^42\) So in the six months following the outbreak of hostilities nearly 2800 people were reunited with their families in the area of their choice with the help of the ICRC.\(^43\) When intercommunal talks were resumed in July 1975 the ICRC felt that it was no longer needed as an intermediary and ceased to take charge of such operations. These were henceforth carried out under the auspices of the United Nations forces stationed in Cyprus.\(^44\)

For the ICRC, Article 26 of the Fourth Convention is an implicit recommendation, nothing more, but this did not prevent it from doing its utmost to reunite dispersed families. However, bitter experience showed the inadequacy of this article, which does not give families separated by war any real right to be reunited. In the words of a particularly well-qualified commentator, ‘The veil of legal protection cast over the integrity of the family is transparent in every part’.\(^45\)

Dispersed families have paid dearly for these shortcomings, which have prolonged the anguish of their separation. It was therefore to be hoped that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law would introduce a more specifically binding provision on this subject, but it did so only to a very limited extent.

Thus Article 74 of Protocol I states that:

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged
This article amplifies Article 26 of the Fourth Convention in three ways:

a) *in terms of the parties for which it is intended*, i.e. not only the parties to a conflict but also the High Contracting Parties: neutral and non-belligerent states and parties to conflict are equally bound to facilitate the reunification of dispersed families;

b) *in terms of the content of the obligation*: not only does it place the parties concerned under an obligation to facilitate enquiries made by members of dispersed families with the object of renewing contact with one another and of meeting, if possible; it also obliges them to facilitate the reunification of dispersed families in every possible way.

c) *in terms of the organizations qualified to help dispersed families*, since the condition that they must be acceptable to the parties to the conflict, which was open to all kinds of abuse, has been dropped.

So although Article 74 of Protocol I, like Article 26 of the Fourth Convention, does not create any real right to reunion which the members of dispersed families could invoke in case of need it does nevertheless make some real though modest improvements.

Article 26 of the Fourth Convention and Article 74 of Protocol I apply *ipso jure* only to international armed conflicts. With regard to non-international armed conflicts, Article 3 of the 1949 Geneva Conventions contains no special provision for the reunion of dispersed families, but Article 4, paragraph 3, of Protocol II does stipulate that: ‘All appropriate steps shall be taken to facilitate the reunion of families temporarily separated.’

The ICRC can therefore base its efforts to facilitate the reunion of dispersed families on this provision, on the fundamental principle of humanity expressed by Article 3 of the 1949 Conventions and Article 4, paragraph 1, of Protocol II, and on the inalienable rights of the family enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. There can be no doubt that Article 3 of the 1949 Conventions authorizes it to offer its services and those of the Central Tracing Agency for that purpose.

Practice confirms these conclusions. From the civil war in Greece to the conflicts later ravaging Tajikistan, Georgia, Rwanda and the Congo, the Central Tracing Agency has endeavoured to carry out the same activities in aid of victims of internal armed conflicts as those the Geneva Conventions assign to it for victims of international armed conflicts. Small wonder; for it is ultimately the victims’ plight that makes those activities essential, and unfortunately nothing changes less from one war to another than human suffering.

These activities probably reached their peak in the conflict in Lebanon from 1975 to 1990. The general chaos afflicting that hapless country resulted in countless tragic separations that required the help of the Central Tracing Agency to resolve them, whilst making its work particularly difficult.
The Agency therefore introduced a family message service relying on a widespread network of voluntary correspondents that gave it access to nearly all communities. It and its correspondents collected, sorted, forwarded and distributed the great majority of the messages, as the Lebanese postal services could no longer do so. When fighting made it impossible to transport the mail, messages were relayed by telephone, provided of course the lines had not been cut. From 1975 to 1985 the Agency forwarded 1,409,764 family messages. In spite of the general turmoil, all but an insignificant number of messages were successfully delivered to their addressees.

In the same period the Agency dealt with 50,125 requests to trace missing persons, making great use of the telephone when it was working, and even greater use of the radio network linking all ICRC offices in Lebanon. As all Lebanese public services had collapsed, and with new groups and factions springing up overnight, making enquiries was heavy going and conditions were exceptionally difficult; every possible precaution had to be taken not to endanger the persons concerned and to prevent hostage-takers on all sides from using the family messages and enquiries channels to announce their latest captures and raise the stakes for prisoners held to ransom.

The ICRC delegation also organized many reunifications when the people concerned and the ICRC delegates escorting them could cross from one zone to another in reasonable safety. Unfortunately not even a rough estimate can be given of how many people were restored to their families. The delegation carried out innumerable line-crossing operations, but there is no means of knowing how many were mainly to reunite dispersed families, and any such description would be arbitrary because there might be several reasons for a single operation. For example, the operations for the evacuation of Deir-El-Kamar in November and December 1983, described above, were intended mainly to remove displaced persons from an overcrowded city where they were in great danger, but they also reunited families separated by the fighting.

Lastly, the delegation was asked to issue travel documents – admittedly in relatively few cases – for persons needing them to rejoin their families abroad.

To sum up, the havoc wrought by the civil war in Lebanon did not stop the ICRC delegation from carrying out nearly all the work in aid of the civilian population that the Geneva Conventions and their Additional Protocols assign to the Central Tracing Agency. The precedent is one not to be overlooked.

* *

It has been shown that the purpose of all the tasks assigned by the Geneva Conventions and their Additional Protocols to the Central Tracing Agency in aid of civilians who have not been deprived of their liberty is to safeguard or restore family unity. They are, in essence, to transmit family messages, make
enquiries to help members of families dispersed by war to resume contact, and active diplomacy to help reunite them if they are separated by front lines, cease-fire lines or national borders.

Apart from reuniting families, there is nothing in the Conventions that obliges belligerents to allow civilians who fled before an invader to return to their own country, nor, a fortiori, that obliges belligerents to allow migration for other reasons. Therefore, if the ICRC offers its services to facilitate the return or transfer of displaced persons who have no claim to family reunification, it must base its offer on its right of humanitarian initiative or on special agreements, as in the following two examples.

The Six-Day War of June 1967 led to a mass exodus from the territories just occupied by Israel. More than 200,000 people, half of them refugees from the 1948 war, left the West Bank, and about 100,000 fled from their homes on the Golan Heights.

When the fighting ceased most of these refugees were living in the direst poverty, and many of them asked to go back home. Conversely, many Egyptian civilians stranded with their families in the occupied Gaza Strip and Sinai wanted to return to the Nile Valley.

As soon as the emergency phase had ended the ICRC requested permission for persons displaced by the war to return home. In June 1967 the Israeli government agreed to allow civilians from the occupied West Bank to do so provided they first obtained authorization granted on a case-by-case basis, for which heads of families had to fill in an application form. The occupying authorities reserved the right to screen such applications for security reasons.

The wording of the application form caused an unexpected dispute which threatened to torpedo the whole project, for the Israeli government insisted that it should bear the heading ‘State of Israel’, whereas the Jordanian government flatly refused to circulate such forms. After strenuous negotiations the ICRC proposed that the two sides should meet under its auspices at the Allenby Bridge. This led to the agreement of 6 August 1967 that the form should bear the name of the ICRC at the top, with the names of the two states concerned alongside it, one on either side. It was further agreed that the operations should be completed by 31 August 1967.

Before that date the ICRC sent the Israeli Ministry of Interior 35,184 applications for repatriation relating to about 140,000 persons. The Ministry granted 4699 permits to return covering about 19,000 persons; however, these permits did not concern any of the former refugees of 1948 who had been displaced for the second time in the war of June 1967. From 18 to 31 August 1967 the ICRC, jointly with the competent authorities and with the Jordanian Red Crescent Society and the Israeli Magen David Adom aid association, organized a series of repatriations which enabled 14,051 people to cross the cease-fire lines and return to their homes in the occupied West Bank.

The ICRC asked for this operation, which was clearly of great humanitarian value, to be extended beyond the time limit of 31 August 1967 so that all
persons wishing to return home, or at least all those whose applications had been granted, could do so. In spite of top-level negotiations and a fervent appeal from the Council of Delegates of the International Red Cross at its meeting in The Hague in September 1967, the Israeli government did not accept this proposal. The ICRC could therefore only offer its services to help in establishing procedures for the reunification of families dispersed by the war.

There was no comparable exodus from Gaza or Sinai, but many Egyptians from the Nile Valley living in the Gaza Strip or Sinai asked to go back to the western side of the Suez Canal. With the permission of the authorities concerned the ICRC registered all such Egyptian nationals and submitted a list of their names to the Egyptian and Israeli authorities for their consent. More than four thousand Egyptians returned to their homes on the western side of the Suez Canal in several operations organized in the latter months of 1967.

There was no repatriation to the Golan Heights apart from the family reunifications already mentioned.

Thus more than 18,000 civilians returned home under the ICRC’s auspices in 1967 from either side of the cease-fire lines. However few this may seem compared with the total number of persons displaced by the Six-Day War, to arrange for their return was a remarkable achievement, given the region’s history and the intransigence of the belligerents.

The Indo-Pakistan conflict of December 1971 led to the dismemberment of Pakistan and the emergence of a new state, Bangladesh. It took place in one of the poorest parts of the world and in humanitarian terms its consequences were deplorable. There were three groups of war victims whose plight called for particular attention:

a) Approximately 75,000 military personnel and 15,000 civilians, all of Pakistani nationality, were captured in East Pakistan and sent to internment camps in India.

b) There were almost 120,000 Bengalis in Pakistan, mainly military personnel and government officials from former East Pakistan and their families; they regarded themselves as Bengali nationals and wanted to return to their native country, which in their absence had become the new state of Bangladesh.

c) There were many Urdu-speaking refugees in Bangladesh, generally known as ‘Biharis’ or ‘non-Bengalis’. They were Muslims from the states of northern India, in particular Bihar, who had taken refuge in East Pakistan when the Indian Empire was partitioned in 1947. In the war of 1971 for the independence of Bangladesh they sided with the Pakistani forces, and were therefore on the losing side when the Pakistan army capitulated after India intervened in December 1971. The Biharis were regarded as collaborators and traitors, and were violently rejected by the Bengali community, with which most of them stubbornly refused to integrate. Although few of
them had ever lived in West Pakistan, they still looked upon themselves as Pakistani nationals and applied to enter Pakistan, which would not admit them. Their exact number was unknown, but the least improbable estimate was between 500,000 and 750,000. Nearly all these unfortunate had been hounded out of their homes and dispossessed of their property, and lived in squalid overcrowded ghettos. There were also seventy-four prisoners of war and a few hundred civilian internees in Bangladesh, all from West Pakistan.

On 28 August 1973 the governments of India, Pakistan and Bangladesh concluded an agreement in New Delhi to settle some of the problems arising from the 1971 conflict. It provided, *inter alia*, for

a) repatriation of all Pakistani prisoners of war and civilian internees in India, except for 195 officers whose extradition was demanded by Bangladesh;

b) repatriation of all Bengalis held in Pakistan and all Pakistanis interned in Bangladesh;

c) transfer from Bangladesh to Pakistan of a ‘substantial number’ of non-Bengalis in the following categories:
   - persons residing or having resided in West Pakistan;
   - former employees of the Pakistani Central Government;
   - members of separated families (immediate relatives);
   - a ‘substantial number’ of special hardship cases, at most 25,000 people.54

The governments of India, Pakistan and Bangladesh asked the Swiss government to lend its good offices to facilitate the implementation of the agreement, and requested the ICRC to register all persons in Pakistan or Bangladesh who were eligible for repatriation. The Office of the United Nations High Commissioner for Refugees (UNHCR) was asked to provide transport for them between Pakistan and Bangladesh.

The ICRC delegation in Pakistan proceeded to register all the Bengali civilians, and processed lists of all Bengali military personnel and their families who had already been registered by the Pakistani authorities. By the end of the year 74,246 civilians and 52,078 military personnel (including their families) were registered. Their applications were sent to the Bangladesh government, which issued entry permits. Once they had obtained such a permit, they were granted an ICRC travel document on which the Pakistani exit visa could be affixed and which was recognized as a Bangladeshi entry visa. Holders of this document were allowed to board aircraft chartered by UNHCR.

In Bangladesh the ICRC delegation opened eight registration centres close to the largest concentrations of Bihari refugees, which were in Dacca itself, at Mohammedpur, Mirpur and Adamjee in the suburbs of Dacca, and at Saidpur, Ishurdi, Khulna and Chittagong in the provinces. Travelling teams registered candidates in localities without a permanent ICRC office, and
under Article 9 of the New Delhi Agreement ICRC delegates visited all the 77 prisons in the country so that all persons entitled to repatriation could apply for it. In less than six months the delegation registered applications covering 535,000 persons (including an unknown number of duplications, as some candidates for repatriation applied to two different offices in the hope of being more readily accepted). Each registration form was at once forwarded to the Pakistani authorities, who were the only ones who could issue entry permits for Pakistan.

The ICRC delegation also co-operated with the Bangladeshi authorities in transferring authorized repatriates to transit camps, and issued them with travel documents which served in lieu of a Bangladeshi exit visa and Pakistani entry visa and enabled them to board the UNHCR-chartered aircraft.

The UNHCR airlift began on 18 September 1973 and ended on 1 July 1974, by which date 118,070 Bengalis had been repatriated to Bangladesh and 108,727 persons had been transferred to Pakistan. In the summer of 1979 another 9248 persons were flown to Pakistan in a new operation. In all, 236,045 persons were repatriated to the country of their choice with the co-operation of the governments concerned, the Swiss Federal Council, UNHCR and the ICRC, while 89,981 Pakistani prisoners of war and civilian internees were repatriated from India to Pakistan under the same agreement.55

To sum up, the Central Tracing Agency’s tasks under the Geneva Conventions and their Additional Protocols to protect civilians who have not been interned or placed in forced residence are limited. The purpose of all these tasks is to preserve or restore family unity: the Agency is authorized to transmit family messages, make family enquiries, and lend its good offices to reunite families dispersed by war.

Nevertheless, the ICRC is free to offer its services to carry out tasks other than those specified by the Geneva Conventions, when the interests of war victims so require. Similarly, parties to a conflict are free to agree among themselves to ask the ICRC and the Central Tracing Agency to take on other tasks, provided these are humanitarian ones intended to alleviate the mental suffering caused by war.

The steps taken by the International Committee immediately after the Six-Day War to facilitate the return of people displaced by the hostilities, and the tasks assigned to it by the New Delhi Agreement of 28 August 1973, have served to illustrate these two possibilities.

Notes

1 For further information see Book II, Part Five, Chapter II, above, pp. 555–79, which also deals with the constitution and legal basis of the Central Agency.
2 Protocol I, Article 78.
4 Rapport général du Comité international de la Croix-Rouge sur son activité d’août 1934 à mars 1938, ICRC, Geneva, 1938, pp. 116–18; XVIIe Conférence internationale de la Croix-
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7 Protocol II, Article 4, paragraph 3 (b).

9 Protocol II, Article 3, paragraph 2 (b).

10 As many as 1,409,764 family messages were exchanged in Lebanon between 1975 and 1985 through the Central Tracing Agency, according to a handwritten note of 26 November 1986 by Miss Christine Van Haver, a staff member of the Agency. I am most grateful to her for kindly carrying out at my request various pieces of statistical research in its archives. More information on the transmission of family messages in Lebanon will be given in the following pages.

11 In 1978, within a single year, 27,900 family messages were exchanged between northern and southern Chad through the Central Tracing Agency (source: the above-mentioned handwritten note by Miss Christine Van Haver).

12 In 1980, 13,000 family messages were exchanged through the Central Tracing Agency office in Kampala, and in 1981, 25,000 messages. Annual Report 1980, p. 16; Annual Report 1981, pp. 18–19.


14 The Bihari are Urdu-speaking Muslims from northern India, mainly from the state of Bihar, who took refuge in East Pakistan when the Indian Empire was partitioned in 1947. In the war for the independence of Bangladesh in 1971 the overwhelming majority of these refugees sided with the Pakistan forces against the nationalist aspirations of the Bengali population among whom they lived. They were therefore excluded from the Bengali community when the state of Bangladesh was created.

15 Source: Miss Christine Van Haver’s handwritten note of 26 November 1986.


20 Enquiry cards ‘tally’ with information cards when the enquiry on the one is answered by information on the other, or when two enquiry cards answer each other (A seeks B and B seeks A). The alphabetic and phonetic filing system evolved by the Agency at the beginning of the First World War, and the cross-reference method it routinely uses, are designed to facilitate such tallies in spite of variations in spelling and the unreliability of much information. Needless to say, these activities have in the meantime been computerized, but the
difficulties arising when a person’s name is misspelt or written or transcribed in various ways nevertheless continue to crop up.


22 In an article published in November 1943, Jean-Georges Lossier states that the Central Tracing Agency dealt with over 400,000 enquiries about individual civilians, some of which could entail more than fifty procedures, such as research, correspondence, further queries, etc. Lossier, ‘De la question des messages familiaux à celle de la protection des civils’, RICR, no. 299, November 1943, pp. 888–913, esp. p. 906.


25 As the 399th Circular to Central Committees of 15 April 1952 points out; see RICR, English supplement, vol. V, no. 4, April 1952, pp. 95–6.

26 For the origin and description of the ICRC travel document see Book II, Part V, Chapter II, above, pp. 568–9.


28 XIXth International Conference of the Red Cross, New Delhi, October–November 1957, Proceedings, pp. 108–9 and 155.


32 Ibid., pp. 452–3.

33 Ibid., p. 454.


36 In these operations, 4301 persons were reunited with their families in the occupied territories and 4962 persons returned to the Nile Valley, according to statistics supplied by the ICRC delegations in the United Arab Republic and Israel. ICRC Archives, files 252 (43) and 252 (171).

37 Statistics supplied by the ICRC delegations in the Syrian Arab Republic and Israel, ICRC Archives, files 252 (124) and 252 (171).


40 Ibid.

41 Rapport d’activité de la délégation du Comité international de la Croix-Rouge à Chypre, du 1er septembre au 30 novembre 1974, Document D 1341 (cyclostyled), p. 12, ICRC Archives, file 252 (35); IRRC, no. 166, January 1975, p. 22.

42 IRRC, no. 169, April 1975, p. 185.

43 This figure does not include an unknown number of persons from both communities who were transferred to the area of their choice immediately after the fighting of summer 1974 in emergency operations that were not generally the subject of written reports.


46 ICRC Archives, file 270 (175).

47 Handwritten note of 26 November 1986 by Miss Christine Van Haver, who has on several occasions kindly done statistical research for me in the Archives of the Central Tracing Agency.

48 Ibid.

49 ICRC Archives, files 270 (175) and 270/ACR (175).
Conversely, an occupying power that forcibly expels some or all of the population of an occupied territory is under the obligation to allow these persons to return home. Individual or mass forcible transfers, and deportations of protected persons from occupied territory, are forbidden by Article 49 of the Fourth Convention and are therefore illegal acts for which the party to the conflict that carries them out bears the responsibility. And according to a well-established principle, responsibility entails the obligation to make restitution.


References

CHAPTER III

THE PROTECTION OF ALIENS IN THE TERRITORY OF A PARTY TO A CONFLICT

The outbreak of war drastically changes the status of civilian nationals of a belligerent state who happen to be in the territory of the adverse party. Previously considered as foreign friends and enjoying the hospitality of the state they were visiting or where they lived, they suddenly become enemy aliens. What fate awaits them?

In antiquity, subjects of a belligerent power who were caught unawares in enemy territory by a declaration of war were part of the spoils of war, just as were prisoners of war. They could be held captive, sold as slaves or put to death.

Enemy subjects were hardly better off in the Middle Ages. However, such harsh treatment hampered the development of trade, for foreign merchants could not be sure that their persons or property would be safe if their sovereign fell out with rulers of other states. They were wiser to stay at home.

It was therefore the trading nations which first introduced guarantees protecting the subjects of other states. *Magna Carta*, signed in 1215 by King John of England, promised foreign merchants that their persons and goods would be safe and secure, and that they would be free to leave the kingdom if war broke out, provided that English subjects in the power of the adverse party were granted the same treatment.1 The Peace of the Pyrenees, signed in 1659 between France and Spain, granted subjects of either nation caught in the other party’s territory by the outbreak of war six months’ grace to dispose of their property and withdraw. The peace treaty reads:

And the better to ensure future Trade and Friendship between the Subjects of the said Lord Kings, to the greater advantage and convenience of their Kingdoms, it has been agreed and granted, that should any quarrel arise hereafter between the two Crowns (which God forbid) the Subjects of either shall always be allowed six months to withdraw and transport their persons and property whithersoever they shall see fit; which they shall be allowed to do in complete freedom and without any hindrance, nor shall any procedure be taken during the aforesaid time to seize their property and still less to arrest their persons.2

Similar provisions granting six, nine or twelve months’ grace appear in most *ancien régime* peace, friendship, navigation and commercial treaties. It could therefore be considered that a customary rule guaranteeing enemy subjects the right to leave the country and take their property with them was established long before the French Revolution. When in 1803 Napoleon ordered
all British subjects to be interned, he represented the order as a reprisal for the seizure of French ships; this clearly shows that its intrinsic illegality was undisputed.3

This liberal practice was threatened by the spread of conscription to most European states in the late nineteenth century. It was argued that according to the principle of self-preservation belligerents were justified in refusing to furnish each other with resources that might increase their means of offence or defence, and therefore that officers and soldiers on the active and reserve lists who were caught on enemy territory by a declaration of war could legitimately be interned as prisoners of war.4

Indeed, at the beginning of the First World War ‘hunting down’ enemy civilians became an almost general practice. Most European states not only interned men of military age but seized women, old people and children as hostages or as a reprisal. No treaty obligation protected these hapless people, and all in all they lived in conditions much more precarious than those of prisoners of war.5

The draft convention protecting civilian persons in the hands of an enemy power, which was approved by the Fifteenth International Conference of the Red Cross, held in Tokyo in 1934, therefore upheld the principle that enemy civilians wishing to leave the territory of an adverse party at the outset of military operations were entitled to do so. The only civilians who could be detained were those liable to be mobilized immediately or within one year, or to whose departure the detaining power might reasonably object for security reasons. In either case, provision was made for appeal to the Protecting Power.6

As is well known, the Tokyo Draft was never formally adopted by a Diplomatic Conference. Consequently there was again large-scale internment of enemy nationals during the Second World War, at least in Europe.7 Following representations by the ICRC, civilians who were in enemy territory when war broke out and were interned solely because of their nationality were given the protection of a legal status in line with that of prisoners of war. These civilian internees – but they alone – enjoyed better living conditions than were usual in the First World War. About 160,000 civilians of fifty different nationalities thus benefited by the assistance of the ICRC and that of the Protecting Power appointed by their country of origin.8

It was nevertheless still necessary to establish firm rules for the treatment of aliens in the territory of a party to conflict. This is the purpose of Articles 35 to 46 of the Fourth Convention.9

Unfortunately the Diplomatic Conference of 1949 did not reinstate the former customary rule guaranteeing enemy nationals the right to leave the territory of a party to the conflict, for Article 35 of the Fourth Convention begins:

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the state.
This means that the state of residence may prevent nationals of the adverse party from leaving its territory if it believes their departure to be contrary to its national interest. Persons refused permission to leave the territory are entitled to have the refusal reconsidered by an appropriate court or administrative board. If their appeal is dismissed the representatives of the Protecting Power must, unless reasons of security prevent it, be given the reasons for refusal. If their departure is permitted, the repatriation must be carried out in satisfactory conditions of safety, hygiene, sanitation and food.

Except for any special measures of control, the situation of persons who are not repatriated must continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, they must be allowed to receive individual or collective relief sent to them; they must receive medical attention and hospital treatment to the same extent as the nationals of the state of residence; they must be allowed to practise their religion; if they reside in an area particularly exposed to the dangers of war, they must be authorized to move from that area to the same extent as the nationals of the state of residence; and children, pregnant women and mothers of young children must benefit by any preferential treatment to the same extent as the corresponding sections of the population of the state of residence.

Where a party to a conflict applies to protected persons measures of control which result in their being unable to support themselves, the said party must ensure their support and that of their dependants.

Protected persons may be compelled to work only to the same extent as nationals of the party to the conflict in whose territory they are, and protected persons of enemy nationality may not be compelled to do work directly related to the conduct of military operations.

Assigned residence (house arrest) or internment are the most severe measures of control that the state of residence may apply to protected persons, and may be ordered only if absolutely necessary for the security of that state. Any protected person interned or placed in assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board. If the decision is maintained, it must be re-examined periodically and at least twice yearly. The Protecting Power must normally be given the names of any protected persons subjected to or released from internment or assigned residence; it must also be informed of the decisions taken concerning protected persons by the appropriate courts or administrative boards.

If the restrictive measures taken against protected persons have not previously been withdrawn they must be cancelled as soon as possible after the close of hostilities.

These provisions apply to civilians of enemy nationality and stateless persons; they also protect nationals of a neutral state who are not protected by a diplomatic mission accredited by their state of origin.
The civilian aliens in most direct need of the ICRC’s protection will of course be those interned or otherwise held in custody. The various ways in which the ICRC can help them – by protection against the effects of hostilities, registration, visits to places of internment or detention, relief operations and repatriation – are described in earlier chapters\(^{18}\) and need no further comment.

In the case of protected persons placed in assigned residence or left at liberty, the activities the ICRC can perform on their behalf will depend on their circumstances and on the supervisory measures to which they are subjected.

They are entitled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. If postal services have been disrupted, the warring parties concerned must apply to a neutral intermediary, such as the Central Tracing Agency, which may set up a service to pass on personal news, in particular with the co-operation of the National Red Cross or Red Crescent Societies.\(^{19}\)

Protected persons are entitled to receive financial allowances from their home country, and individual or collective relief sent to them.\(^{20}\) They must have every facility for contacting and making requests to the Protecting Powers and the ICRC, whose delegates are entitled to visit them.\(^{21}\)

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Thus the Geneva Conventions assign various duties to the International Committee in aid of nationals of a party to a conflict who are in enemy territory, even if they are not held in custody.

Since 1949 there has been little occasion to implement those provisions, either because there were no civilian nationals of either warring party in the territory of the adverse party (this was the case, for example, with the United States and North Vietnam in the Vietnam War), or because enemy aliens were not subject to any restrictions, as in the Falkland Islands conflict between Argentina and Great Britain, or because all enemy aliens were interned. Furthermore, by their very nature these provisions are not of a kind that can be applied in non-international armed conflicts.

In fact it seems that the International Committee has invoked Articles 35 to 46 of the Fourth Convention on only two occasions: in the Suez conflict of October–November 1956 and in the Gulf War of 1990–1.

Following the Suez conflict, the Egyptian government decided to compel all the approximately 55,000 Jews resident in Egypt to leave the country. No sooner were active hostilities brought to a close than they were threatened with general and immediate expulsion. This threat was not carried out, but intense pressure was put on them to leave ‘voluntarily’: Jewish businesses, shops and financial establishments were nationalized, the property of Jews was confiscated, Jewish employees were dismissed and Jews were interned, intimidated and subjected to harassment. This treatment was applied to
foreign nationals of the Jewish faith, to the many stateless Jews who especially since 1933 had found refuge in Egypt from persecution in Europe, and even to Jews of Egyptian nationality whose families had lived in Egypt for many generations.

The ICRC considered that it had no mandate to look after foreign nationals who were protected by the diplomatic mission of their country of origin, or by the Protecting Power appointed by the British and French governments. Recognizing, however, that stateless persons were protected persons within the meaning of Article 4 of the Fourth Geneva Convention, the ICRC undertook to help them by performing the duties normally assigned to a Protecting Power. It endeavoured to take similar action in aid of Jews of Egyptian nationality – most of whom were stripped of their nationality, first de facto and then de jure – in so far as the Egyptian government was willing to turn a blind eye.

On 27 November 1956 the International Committee sent a telegram to the Egyptian government asking it to suspend all immediate expulsions and allow enough time for the provisions of the Fourth Convention to be respected. The ICRC delegation in Egypt later undertook to remit subsidies to various Jewish charitable associations in Cairo and Alexandria, to visit internees, shepherd would-be emigrants through the maze of administrative formalities required to obtain permission to leave the country, support their applications, and lastly organize transport for people who could otherwise not afford to emigrate.

For this purpose it chartered fourteen ships which carried 7190 stateless persons to Naples or Piraeus. Here they were taken over by the Intergovernmental Committee for European Migration (ICEM) or by Jewish organizations, which transferred them to a permanent host country (Israel or countries in western Europe, North or South America, Australia or New Zealand).

The delegation asked for emigrants to be allowed to take their personal effects with them, as well as enough money to continue their journey, but the International Committee considered that it had no mandate to protect economic interests and property beyond the bare minimum.

This operation was to some extent outside the scope of the Geneva Conventions, since it was not strictly speaking concerned with repatriation but with emigration. It was financed mainly by Jewish charitable organizations, in particular the American Joint Distribution Committee.

In early 1962 the Egyptian government, which had meanwhile reversed its policy on the emigration of Egyptian Jews, ordered the ICRC delegation to close down its offices.

The Iraqi occupation of Kuwait on 2 August 1990 took the world by surprise, so much so that a number of Kuwaiti nationals found themselves in Iraq at the time of the invasion. Some were interned while others were left at liberty but subjected to measures of control. The nationals of countries
co-operating in the embargo decreed by the United Nations Security Council were also interned or placed under house arrest.

Whether they had been interned or left at liberty, all Kuwaiti nationals in Iraq were protected persons under the terms of Article 4 of the Fourth Geneva Convention. So, it must be acknowledged, were the other foreign nationals held in Iraq, since the diplomatic missions of their countries of origin were not able to act on their behalf or give them the protection provided for by international usage.

Whatever the case, the International Committee offered its services to the Iraqi authorities with a view to providing protection and assistance to both Kuwaiti and third country nationals.

The ICRC suggested in particular that it visit foreign nationals who were not allowed to leave Iraq and did not benefit from the protection of the consular services of their countries of origin, that it set up a family message service for those foreigners and their families, that it provide them with relief supplies and that it facilitate the departure of those authorized to leave Iraq, specifically by drawing up travel documents for those who had no identity papers and by organizing appropriate means of transport.24

The Iraqi authorities rejected the ICRC’s offer, preferring to discuss the fate of foreign nationals – with the exception of the Kuwaitis – within the framework of bilateral discussions with their countries of origin. As for the Kuwaitis, they were said to be Iraqi citizens whose situation was an Iraqi internal matter. With the exception of the Kuwaitis, all foreign nationals were released during the final weeks of 1990.25

ICRC delegates did have access, however, to a few Iraqi citizens who had been interned in the United Kingdom and France.26

After the cease-fire on 28 February 1991, the ICRC’s delegates were able to meet the Kuwaiti citizens interned in Iraq, and the Kuwaitis who had not been interned were authorized to take up contact with the ICRC delegation in Baghdad. The ICRC organized the Kuwaitis’ repatriation – or at least the repatriation of all those whose return had been permitted by the Kuwaiti authorities. While waiting for the repatriation to take place, the ICRC set up a family messages service between them and their families and distributed relief supplies to those who needed them.

But it was the plight of foreign nationals in Kuwait that became a major concern. There were in fact several thousand Iraqis and tens of thousands of Palestinians, Jordanians, people of other nationalities and stateless people (the Bedun) in Kuwait at the time. The Iraqis, the Palestinians, the Jordanians and to a lesser extent the stateless people were collectively accused of having collaborated with the occupying power and many of them were imprisoned. Moreover, the Kuwaiti authorities decided to implement a policy aimed at returning Kuwait to the Kuwaitis and sharply reducing the number of non-Kuwaiti residents, even by means of mass expulsions.

No sooner had Kuwait been liberated than the clamp-down began: there was widespread intimidation in the form of arrests, internment in over-
crowded places of detention, abductions, expulsions, and so on.

When hostilities broke out between the Coalition members and Iraq on 17 January 1991, the ICRC had sent delegates to Riyadh and Bahrain to establish contact with the Coalition High Command and to proceed to Kuwait as soon as it became possible to do so. In their interviews with the Kuwaiti authorities and the High Command, the delegates stressed that everything had to be done to ensure that the liberation of Kuwait was not marred by massacres and the settling of accounts.

With the help of the Coalition armed forces, the delegates managed to get to Kuwait on 1 March 1991, a mere seventy-two hours after the liberation, only to witness the very thing they had tried to prevent: the pent-up hatred of seven months of occupation was unleashed and, in the existing political vacuum and general chaos, terror took hold of non-Kuwaitis as acts of private revenge grew rife.

The intimidation measures were directed first and foremost at Iraqi citizens – soldiers and civilians – who were still in the Emirate but in hiding, at about 170,000 Palestinians (most of whom had Jordanian identity papers), at the citizens of countries who had sided with Iraq, in particular Jordan, Yemen and Sudan, and at about 150,000 stateless people (Bedun), some of whom had been living in Kuwait for decades. The International Committee considered that the Iraqis, the Palestinians, the stateless persons and generally speaking all foreign nationals deprived of the protection of the diplomatic or consular services of their countries of origin were protected persons under the terms of the Fourth Geneva Convention.

Obviously, the fate of those who had been arrested was the source of greatest concern. The delegates asked to see them, and the first visit took place on 23 March, at a military prison. By the end of the year, the delegates had carried out over 600 visits to different places of detention in Kuwait; they had seen more than 5200 detainees, about one thousand of whom were still incarcerated in December 1991.

At the same time, the ICRC delegation made every effort to assist the non-Kuwaitis. Since the various parts of the city had been separated by checkpoints at which most non-Kuwaitis would not have dared to come forward, the delegation opened offices in the quarters populated by Palestinians or stateless persons, namely in Hawalli, Jahra, Fahaheel and Farwaniya, and in Jabriya, where the main office was located.

The delegates informed the Kuwaiti authorities of all the excesses they were aware of and asked that effective steps be taken to stop them. They made the same request of the Coalition countries whose armed forces had taken part in the liberation of Kuwait. The delegates also asked that non-Kuwaitis be given access as in the past to food shops, distribution cooperatives and hospitals. The ICRC furthermore set up a service for exchanging family news and tracing persons who had gone missing during the Iraqi occupation or after the liberation. Since many foreign residents had no identity papers, the ICRC dealt with the necessary formalities to obtain from their
countries of origin the documents they needed to recover their legal status and be able to return home. The delegation also issued travel documents for those who had no identity papers and who had found a host country. Lastly, the delegates provided help to the thousands of foreigners and stateless persons who were stranded in Al-Abdali camp, near the Iraqi border on the road from Kuwait to Basra.27

As the weeks passed and the Kuwaiti government gradually re-established its authority, the number of violent incidents and acts of revenge started to drop. On the other hand, the various forms of intimidation and harassment intended to provoke the departure of non-Kuwaitis continued, as did the expulsions of detainees to Iraq.

The ICRC considered that it could not oppose the principle of the expulsions, as no state is bound to keep on its territory foreign nationals whom it deems to be undesirable. However, the terms and conditions under which the government’s policy was implemented gave cause for serious reservations.

The International Committee made known its profound concern in a memorandum dated 15 June 1991. It asked in particular to be notified in advance of any expulsion order, whether relating to a detainee or not, so that it could inform the family. It also requested that its delegates be permitted to meet persons under expulsion orders and to speak with them in private, so as to ensure that no one was sent to a country where there was reason to believe he or she would be persecuted; that family members be allowed to remain together whenever possible; that those being expelled be given the opportunity to take their personal effects with them; and that ICRC delegates be present on either side of the border so as to facilitate the crossing.28

The authorities agreed to these conditions, and starting in July the delegates spoke individually with every detainee placed under an expulsion order. They were thus present at the expulsions of 1734 detainees and their families, or about six thousand people in all. The delegates also took steps to facilitate the departure of the thousands of foreign nationals who wished to leave Kuwait, either of their own free will, or – in the immense majority of cases – because they realized that there was no future for them in the Emirate. They worked in particular to cut through the endless red tape by which the authorities hampered the departures of people they had every intention of getting rid of.29

Lastly, the issue of judicial assistance for foreign nationals had become particularly acute. The Kuwaiti authorities had set up courts to shed light on the Iraqi occupation and punish the crimes committed during that period. The first judgments handed down betrayed a serious disregard of the rights of defence and were universally condemned, even by Kuwait’s allies. Although the ICRC had no specific mandate in this respect, its delegates followed the proceedings closely. They examined the punitive measures applied by the courts so as to ensure they were in keeping with the rules of international humanitarian law; they were attentive observers at the trials to see that the fundamental legal guarantees were respected, but did not intervene – some-
thing no court would tolerate. Outside the courts, the delegates established fruitful contacts not only with counsel for the defence but also with the public prosecutor’s office and the judges. They did not, of course, try to influence the judges, rather they drew the latter’s attention to the need to respect the rights of defence and to make sure every person accused had a fair trial. The delegates submitted reports on their observations during the trials to the Kuwaiti authorities and made a number of requests: that detainees awaiting trial be brought before the court; that those who had been acquitted be indeed released; and that all sentences handed down be re-examined in due course so as to guarantee that the principle of proportionality between punishment and offence be respected. The head of the ICRC delegation asked the Crown Prince and Prime Minister to commute all death sentences to imprisonment; his request was granted.30

This presence in the legal sphere proved particularly useful and effective. While the ideal of calm and impartial justice is difficult to attain when feelings are inflamed by war, the work of the ICRC’s delegates nevertheless exerted a moderating influence with a view to ensuring that in each case the fundamental legal guarantees and the rights of defence were duly respected, whatever the origin of the accused person or the gravity of the indictment.

The International Committee, which had not been allowed to carry out any activities in Kuwait during the seven months of the Iraqi occupation, was thus able to take effective action on behalf of the non-Kuwaiti population after the liberation.

Notes

1 Articles 41 and 42; The text of Magna Carta will be found in The New Encyclopaedia Britannica, fifteenth edition, 1991, vol. 7, pp. 674–5.  
6 Draft International Convention concerning the Condition and Protection of Civilians of Enemy Nationality who find themselves on the Territory of a Belligerent or on Enemy-occupied Territory, Articles 2 and 4, Quinzième Conférence internationale de la Croix-Rouge, tenue à Tokio du 20 au 29 octobre 1934, Compte rendu, pp. 262–8, esp. p. 263; Draft International Convention concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in a Territory occupied by it, ICRC Library, ref. no. 341.3/44 – bis (ENG) cyclostyled.  
7 Seeger, Le statut personnel, pp. 31–47.  
9 Articles 35 to 46, in particular, of the Fourth Convention apply to aliens in the territory of a party to conflict, but are not the only provisions applicable to them. Articles 1–12 (General provisions), 13–26 (General protection of populations against certain consequences of war), 27–34 (Provisions common to the territories of the parties to the conflict and to occupied territories), 136–41 (Information bureaux and Central Agency) and 142–59 (Execution of the Convention) also apply. In addition Articles 79–135 apply to civilian internees, whether in the territory of a party to a conflict or in occupied territory. In accordance with Article 4 of the Fourth Convention, all these provisions protect not only enemy nationals, but also stateless persons, and neutral nationals not protected by the diplomatic mission of their country of origin. Article 73 of Protocol I confirms that refugees and stateless persons are protected persons within the meaning of the Fourth Convention.

10 Article 35.

11 Article 36.

12 Article 38.

13 Article 39, paragraph 2.

14 Article 40, paragraphs 1 and 2.

15 Articles 41–3.

16 Article 46.

17 Article 4.


19 Article 25.

20 Articles 38 (1), and 39, paragraph 3.

21 Articles 30 and 143.

22 ICRC telegram to Mr Mahmoud Fawzi, Minister of Foreign Affairs, 27 November 1956, ICRC Archives, file 233 (43), file I.

23 Annual Report 1956, p. 29; Annual Report 1957, pp. 25–7; ICRC Archives, file 233 (43), files I-IV.

24 Note no. 241 from the ICRC delegation in Baghdad + annexes, 12 September 1990, ICRC Archives, file 233 (43), file I.

25 Keesing's Record of World Events, 1990, pp. 37638–9, 37697, 37758–9, 37871 and 37926.

26 ICRC Archives, files 221 (51–70) and 221 (52–70).

27 The Kuwaiti Red Crescent and the League of Red Cross and Red Crescent Societies provided most of the assistance for those interned at Al-Abdali camp; the ICRC, for its part, focused on representations for their protection, on the exchange of family messages and on restoring contact between the internees and their families.

28 ICRC Archives, file 202 (214) – file I.


References

I know of no study of ICRC activities in this domain, but there is abundant literature on the treatment of enemy civilians in the territory of a party to a conflict, for example: The Geneva Conventions of 12 August 1949: Commentary, published under the general editorship of Jean S. Pictet, vol. IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, especially pp. 199–271; Erik Castrén, The Present Law of War and
The Protection of Aliens

CHAPTER IV

RELIEF OPERATIONS IN AID OF THE CIVILIAN POPULATION

A Dorian war shall come and with it, plague.
Oracle quoted by Thucydides,
*History of the Peloponnesian War,*
Book II, Chapter II, paragraph 54.

1. Introduction

‘War nourishes war’ goes the most misleading of sayings. But war in fact does just the reverse, misdirecting the creative impulse of men to acts of death and destruction, laying waste fields and cities, annihilating the means of production, bringing trade to a standstill. It almost invariably bleeds both victor and vanquished dry and leaves them utterly ruined. Traditional wisdom the world over has rightly always portrayed war as leading famine, pestilence and death in a macabre and fearsome saraband.

Since the belligerents keep most of their available supplies to feed their fighting forces, prisoners and the civilian population are hardest hit by the penury, privations and destruction that inevitably accompany all armed conflict.

Though originally founded to come to the aid of wounded soldiers on the battlefield, during the First World War the Red Cross made its first move to help civilian victims of war, starvation and epidemics. Several National Societies, in particular the American Red Cross, set up large-scale relief operations for the civilian populations in greatest need, especially in the stricken areas of northern France, Belgium, Poland and the Balkans.¹

The International Committee itself had only limited resources, which were completely absorbed by its aid to prisoners of war and civilian internees. Immediately after the Armistice, however, it played an active part in combating epidemics in eastern Europe and in other relief operations for the distressed civilian population.²

The ICRC again took the initiative of launching relief operations for the civilian population during the war between Greece and Turkey (1919–23) and the Spanish Civil War (1936–9).³

In the Second World War the International Committee and the League of Red Cross Societies went a step further and formed the Joint Relief Commission of the International Red Cross to carry out aid operations for the civilian population of occupied Europe. The ICRC also launched a large-
scale operation to supply food to the population of Greece, and carried it out jointly with the Swedish government.4

These initiatives led to several important provisions in the Geneva Conventions of 12 August 1949 and the Protocols additional thereto, which will be better understood by distinguishing between the various predicaments of civilian war victims as follows:

a) relief operations in aid of civilian nationals of a party to a conflict who are under that party’s authority;
b) the question of blockades;
c) relief consignments to besieged areas;
d) aliens in the territory of a party to conflict;
e) the population of occupied territory.

Each of these will now be considered in turn.

Relief operations in aid of internees and other civilian detainees were discussed in Chapter IV, Part V above,5 and need not be further considered here.

2. Relief operations in aid of civilian nationals of a party to a conflict who are under that party’s authority

Starvation and epidemics strike blindly. Enemy aliens and the population of occupied territory are not the only ones to suffer the hardships that are the bitter fruit of any armed conflict. The warring party’s own civilian population will suffer too.

Unless there is a siege or a blockade, however, the Geneva Conventions do not provide specifically for relief operations in aid of civilians who are under the authority of their power of origin. This is only natural, for the 1949 Conventions are based on the assumption that each party to a conflict is responsible for its own population and will do all it can to provide it with essential commodities. Humanitarian law does not intervene between a state and its nationals except in non-international armed conflicts.

To offer its services in aid of a civilian population which is under the authority of its power of origin, the ICRC must therefore base its intervention on its right of humanitarian initiative. It is entitled to do so by Article 10 of the Fourth Convention:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.6

It is important to note that this article covers all civilians, and not only protected persons as defined by Article 4 of the Fourth Convention. It authorizes
the ICRC to offer its services in order to bring protection and assistance not only to civilians in the power of the warring party whose nationals they are, but also to those who have fallen into enemy hands. Nonetheless, any relief operation based only on Article 10 of the Fourth Convention is subject to the consent of the parties to the conflict concerned.

At this point a definition of the term ‘parties to the conflict concerned’ is required. It must be taken to mean those parties to a conflict upon which the possibility of carrying out the proposed operation depends – the party providing relief, the party receiving it, the parties which allow it to pass through the territories they control and, when a naval blockade is in operation, the blockading power. But except in the case of a siege or blockade, each party to a conflict is competent to decide only with regard to persons and territories over which it has effective control; it would be totally unacceptable for a relief operation for the civilian population of a warring party to be subject to the consent of the enemy.

The principle of national sovereignty, and the very nature of things, require that a relief operation must first be approved by the party to a conflict which exercises its authority over the people who are to benefit. It would be inconceivable for a humanitarian institution such as the ICRC to carry out a relief operation in the non-occupied territory of a party to a conflict without that party’s consent. The Diplomatic Conference of 1949 did not feel that this requirement would hamper relief operations needed by the civilian population of parties to a conflict; since each belligerent was duty bound to look after its own population, it was thought inconceivable that any belligerent might refuse relief operations for its own nationals.

Since 1949, however, belligerents have on several occasions refused relief operations in aid of their nationals, either for ideological reasons, in that they would not admit to shortages and preferred to gloss them over, or because they would not allow the foreign nationals needed for the proposed relief operations to enter the country.

The 1974–7 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law therefore adopted various provisions concerning relief operations for the civilian population of non-occupied territory, in particular Article 70, paragraph 1, of Protocol I:

If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with [food and medical supplies, clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population and objects necessary for religious worship], relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
This provision confirms that relief organizations must obtain the consent of the parties to the conflict concerned, whilst restricting the right of those parties to refuse it. Article 70, paragraph 1, stipulates that if the civilian population of any territory under the control of a party to the conflict, other than occupied territory, is not adequately provided with certain specified supplies, humanitarian and impartial relief actions ‘shall be undertaken’. The use of the peremptory ‘shall’, and the preparatory work, clearly show that the parties to the conflict are not altogether free to refuse their agreement to relief operations. The provision also confirms that offers of humanitarian and impartial relief shall not be regarded as unfriendly acts, either by the party to the conflict to whom such an offer is made or by the adverse party.

The Conventions contain no provisions concerning exemption from customs duty and other charges that some belligerents might be tempted to levy on goods imported for relief operations. International Conferences of the Red Cross have therefore repeatedly asked for material aid sent from one country to another via the Red Cross to be granted exemption from charges of any kind. It would, after all, be hard to understand – and a deterrent for donors! – if a party to a conflict were to levy customs duties or other charges on relief supplies intended for its own population. Belligerents have therefore generally agreed to waive customs duties on all aid for the civilian population, and to transport it either free of charge or at greatly reduced rates.

Relief operations in war-devastated countries will often require the presence of nutritionists, medical and paramedical personnel, logistic experts, pilots, drivers, mechanics and other specialized personnel to assess the needs and to transport and distribute the relief consignments. The Fourth Convention does not define the status of such personnel. International Conferences of the Red Cross have therefore regularly asked governments to give National Societies and the international Red Cross organizations every facility for their work, in particular with regard to visas and freedom of movement for their personnel. This matter is now regulated by Article 71 of Protocol I.

Article 44, paragraph 3, of the First Geneva Convention authorizes the ICRC and the International Federation of Red Cross and Red Crescent Societies to use the red cross emblem, both in peacetime and in time of war, to identify relief operations in aid of the civilian population.

Clearly, the Geneva Conventions contain only the most basic regulations for relief operations in aid of a belligerent’s own civilian population. This is hardly surprising, for barring a siege or blockade – which are the subject of separate regulations – operations of that kind are unlikely to raise any particular legal problems in international armed conflicts.

This cannot be said of non-international armed conflicts. In such situations, one or the other of the contending parties – or both – will probably claim to be the only legitimate government and avail itself of this claim to oppose any relief operation by the ICRC in aid of the civilian population controlled by the adverse party.
But is the International Committee bound by such claims? As stated earlier, Article 3 common to the four Geneva Conventions of 1949 does not discriminate between the parties to a conflict. Moreover, it stipulates: ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ Obviously this provision authorizes the ICRC to offer its services on equal terms to both parties and except in the case of a siege or blockade, which will be considered separately, to undertake any relief operation accepted by one of them, whether or not the adverse party gives its assent.12

Do the results of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law confirm or invalidate these conclusions? The answer does not lie in Article 18, paragraph 2, of Protocol II, which states:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.13

Indeed, it is not at all clear how this provision should be interpreted.

Generally speaking, the phrase ‘High Contracting Parties’ in the Geneva Conventions and their Additional Protocols means the states party to those instruments. This raises the question of what body is qualified to give or refuse the state’s consent. Normal international practice is for the government to make known the will of the state in its relations with other states and with international organizations. But when the state itself is torn asunder by civil war and has no control over part of the population and national territory – and these are precisely the circumstances in which Protocol II is applicable – is that government still entitled to express the will of the part of its population that no longer acknowledges its authority and opposes it by force of arms?

The Diplomatic Conference did not settle that question and the following two interpretations are therefore possible:

a) The party claiming to be the legitimate government is entitled to give or refuse its consent on behalf of the High Contracting Party as a whole, i.e. on behalf of the entire state that is divided by civil war. Provided Protocol II is applicable, that party is therefore entitled to raise a valid objection to relief operations for civilian war victims effectively controlled by the adverse party. Several delegations at the Diplomatic Conference supported this interpretation, but it makes Article 18, paragraph 2, of Protocol II contradict Article 3 of the Geneva Conventions, whereas Protocol II is intended to develop and amplify the said Article 3.

b) Alternatively, each party to the conflict is entitled to give or refuse the consent of the High Contracting Party in respect of that part of the national population and national territory under its effective control.14
Whatever the correct answer to this question, the parties to an internal conflict have no discretionary right to oppose operations for the relief of war victims. This is clear from Article 7 of Protocol II, which stipulates that the wounded and sick shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition; furthermore, Article 14 of Protocol II prohibits starvation of civilians as a method of combat.

It follows that no party to a conflict may validly object to operations for the relief of a civilian population which is suffering from hunger and lack of medical care. To do so would be a flagrant example of abuse of rights, and neither international law nor domestic law protects abuse of rights.15

Treaty law does not specify, except in very general terms, the form that relief operations for the civilian population should take. It stipulates only that they must be humanitarian and impartial and conducted without any adverse distinction, and that in distributing relief consignments priority must be given to persons who require special protection, such as children, expectant mothers, maternity cases and nursing mothers.16

The guidelines for such operations must therefore be drawn from the Fundamental Principles of the Red Cross and Red Crescent. Three of these principles apply directly to relief operations:

a) The principle of humanity requires the International Red Cross and Red Crescent Movement to endeavour to prevent and alleviate human suffering wherever it may be found.

b) The principle of impartiality requires the Movement to make no distinction as to nationality, race, religious beliefs, class or political opinions, but to endeavour to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

c) The principle of neutrality requires the Movement not to take sides in hostilities or engage at any time in controversies of a political, racial, religious, or ideological nature.17

It would be a great mistake to regard the Fundamental Principles of the Red Cross and Red Crescent as merely abstract norms without any practical application. They are, on the contrary, rules of conduct designed to direct the activities of the National Societies, the ICRC and the International Federation, in particular in relief operations.

Thus the principle of humanity requires that the purpose of any relief operation must be to prevent and alleviate human suffering. Such assistance is destined solely for the actual people in distress, and must be delivered to them alone.

This is an important conclusion, for some governments behave as though the relief supplies in operations intended for their population were supposed to be delivered to them. They are encouraged in this belief by some intergovernmental organizations, including members of the United Nations
family, which consider that their job is to aid member countries, and that they have done this once they hand over their material assistance to the government of the recipient state. They regard the distribution of that assistance within the country as an internal matter within the sole responsibility of the state concerned.

Relief operations under Red Cross auspices are on very different lines, especially those in aid of war victims. There can be no other recipients than the victims themselves. When relief is provided via the ICRC, the ICRC itself must monitor its transport and distribution. Only then will its relief operations be recognized and respected as being purely humanitarian, impartial and neutral. Only supervision by the ICRC will ensure that relief supplies for the civilian population of a party to any conflict are not regarded by the adverse party as assistance to the enemy.

Naturally, this approach does not rule out close co-operation between the ICRC and the public services and National Society of the country for whose population the relief supplies are intended. It would be unthinkable for the ICRC to set up a state within a state by conducting a relief operation without enlisting their help.

A further requirement of the principle of humanity is that the purpose of the proposed relief operation must be ‘concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit’. The order in which people are given assistance will depend only on their degree of distress and need. Priority must be given to those whose needs are most urgent.

This conclusion, obvious in peacetime, is soon forgotten in time of war. A nation straining every nerve to survive is sorely tempted to keep most of its resources for those fighting to preserve it, and to forget people who cannot actively support the war effort, such as the aged and infirm and young children. It is not for the Red Cross to question the priorities set by the national authorities, but it can and must make perfectly clear that it cannot associate itself with their priorities and that its duty is to help first and foremost those people who are most vulnerable and most at risk.

The principle of impartiality requires the Red Cross to make no distinction based on nationality, race, religious beliefs, class and political opinions in its relief operations. It does not oblige the Red Cross to distribute supplies with mathematical equality – that would often be absurd – but it does require Red Cross institutions to provide assistance commensurate with needs, and regardless of any affiliation.

The application of this principle has often led to difficulties, as at the start of the joint ICRC – UNICEF operation in Kampuchea.

At the end of a particularly cruel and lethal civil war Cambodia fell under the domination of a group of fanatical leaders, the Khmer Rouge, who on the pretext of carrying the revolutionary experiment to its extreme perpetrated countless massacres and ruined the country. In January 1979 the Vietnamese forces overthrew the Khmer Rouge and set up, under the name of People’s
Republic of Kampuchea, a new regime that immediately concluded a military alliance with Vietnam.

Both the ICRC and UNICEF, whose delegations had been expelled from Phnom Penh in April 1975 immediately after the Khmer Rouge victory and whose subsequent efforts to help the population of Cambodia had been in vain, promptly offered their services to the new authorities.

However, it was not until July 1979 that they were invited to send a mission to Kampuchea. The conditions the delegates found when they arrived were inconceivable: deserted towns, neglected fields, no public services, and only a tiny fraction of farm land still under cultivation. Obviously the country was heading for disaster and a large-scale relief operation was needed to halt the advance of famine. The ICRC and UNICEF put forward a comprehensive plan to save the Cambodian people from this new ordeal, and agreement had almost been reached on the *modus operandi* when hundreds of thousands of Cambodian refugees flooded back towards the Thai border, seeking to escape imminent starvation. Some of them were allowed into Thailand; the others found themselves confined to border regions outside the control of the Phnom Penh authorities.

These refugees were in even worse straits than the rest of the Khmer people. As they could not be reached from Phnom Penh, the ICRC and UNICEF decided to use the only possible access route – via Thai territory – to come to their aid.

The government of the People’s Republic of Kampuchea reacted angrily, threatening in its memorandum of 28 September 1979 to expel the joint ICRC-UNICEF mission unless both institutions formally undertook to deliver all available relief to it and to suspend any relief operations for the civilian population controlled by the Khmer Rouge or any other resistance movement. The Phnom Penh authorities regarded any relief operation from Thai territory as violating the sovereignty of the People’s Republic of Kampuchea, interfering in its internal affairs and helping the Khmer Rouge under the guise of assisting all parties as a matter of principle.19

This attitude placed the ICRC and UNICEF in a quandary. Obviously they could not help most of the Cambodian population without the co-operation of the Phnom Penh government, which controlled the larger part of the country, but neither could they leave war victims to their fate when aid could be got through to them. Also, if they gave in to the Phnom Penh government’s demands the ICRC and UNICEF would create a precedent that might seriously restrict their future freedom of action, in Kampuchea or elsewhere.

The International Committee based its decision squarely on the principles of humanity and impartiality. It concluded that it had not only the right but also the duty to assist all victims of the conflict; that the principle of impartiality obliged it to offer its services to all parties on equal terms; and that no government was entitled to demand that it violate the fundamental Red Cross principles.
The Executive Director of UNICEF came to a similar conclusion, based on the principle of non-discrimination contained in the Charter of the United Nations and in the constituent instrument of UNICEF.20

Both institutions therefore decided to continue their discussions with the Phnom Penh government in hopes of reaching agreement on a comprehensive assistance programme for the Cambodian population, whilst continuing *ad hoc* operations for refugees in border areas. Although the Phnom Penh government continued to protest against relief operations carried out across the Thai border, it finally agreed to go on co-operating with the ICRC and UNICEF.21

Within fifteen months and with the backing of governments, National Red Cross Societies, the European Economic Community, the World Food Programme and other organizations, the ICRC and UNICEF delivered over 250,000 tonnes of foodstuffs and more than 40,000 tonnes of seed for rice and vegetables to Kampuchea, plus clothing, tools and sufficient medical aid to restock all the hospitals and dispensaries in the country. In addition UNICEF gave large quantities of equipment and supplies so that schools could be reopened. To unload, transport and distribute the relief consignments in a completely disorganized country, cranes, fork-lift trucks and over a thousand lorries also had to be imported.

At the same time, the ICRC and UNICEF continued their relief operation both for civilians gathered in the border regions and for refugees who had found shelter in Thailand. This two-pronged operation saved the Cambodian people from starvation and helped to reactivate agriculture, education and health services.22

In the judgment rendered on 17 June 1986 in the case of military and paramilitary activities in and against Nicaragua, the International Court of Justice examined the question whether assistance to a rebel movement – in this case the counter-revolutionary forces of Nicaragua – was lawful without the agreement of the government of the state concerned.

The Court unhesitatingly agreed that strictly humanitarian aid could not be regarded as unlawful intervention, whatever the party to which the beneficiaries belonged:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.23

According to the Court, such aid had to conform to the fundamental principles of the Red Cross, and especially to the principles of humanity and impartiality:

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the
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Six-Day War: Distributing relief supplies to prisoners of war in Atlit camp, Israel, 7 July 1967. ICRC/Jean Mohr, ICRC Photo Library: ISRABE 1967-86/26

Arab-Israeli conflict of October 1973: At kilometre 101 along the road between Cairo and Suez, the Egyptian, ICRC and Israeli representatives go through the list of prisoners of war to be repatriated, 23 January 1974. United Nations/Y. Nagata, ICRC Photo Library: ISRABE 74-96/8
Conflict between Honduras and El Salvador, 1969: Repatriation of prisoners of war. Salvadoran prisoners of war being escorted over the border by an ICRC delegate. ICRC Photo Library: HIST 2556/13

Arab-Israeli conflict of October 1973: In the no man’s land around Port Fuad, Egyptian soldiers search under ICRC protection for the bodies of fellow-servicemen. ICRC/Max Vaterlaus, ICRC Photo Library: ISRABE 73-38/25
Indo-Pakistan conflict, December 1971: ICRC delegate checking the list of war disabled about to be repatriated on board an ICRC aircraft. ICRC/Jean-Jacques Kurz, ICRC Photo Library: INDO-PAK 71-72/31
Angola: Seriously wounded Angolan prisoners of war repatriated from Namibia arrive at Luanda airport, 17 August 1982. ICRC/Liliane de Tolèdo, ICRC Photo Library: ANGO 82-116/7 A
Iran/Iraq conflict: Iranian and Iraqi war disabled being released under ICRC auspices at Ankara airport, with the help of the Turkish Red Crescent Society, February 1984. Turkish Red Crescent Society, ICRC Photo Library: HIST 3080/29
Palestine conflict, 1948–9: In the course of an operation organized by the ICRC on 18 June 1948, over 1,100 Palestinian women and children are evacuated from an area occupied by Israeli forces to a zone controlled by Arab forces near Tulkarem. ICRC Photo Library: PALESTINE 1948–1950-4/2674

Cyprus, 1974: ICRC delegates evacuating elderly people left behind after the exodus of the civilian population from villages in the north. ICRC/Max Vaterlaus, ICRC Photo Library: CHYP 1974-29/5
Cyprus, 1974: Searching for missing persons. The card indexes at the Central Tracing Agency office in Nicosia. ICRC/Max Vaterlaus, ICRC Photo Library: CHYP 74-31/23 A

Cyprus, 1974: Searching for missing persons. Greek Cypriots scanning a bulletin board in the hope of finding a familiar face. ICRC/Anne-Marie Grobet, ICRC Photo Library: HIST 3080/26
Lebanon, 1982: A tracing request form with a photo of a boy reported missing by his family. ICRC/Luc Chessex, ICRC Photo Library: LIBAN 82-19/31

Lebanon, Bekaa valley, 1984: Helping a mother read the family message just brought to her. ICRC/Thierry Gassmann, ICRC Photo Library: LIBAN 84-206/111
Uganda, March 1984: Together again! ICRC/Liliane de Tolédo, ICRC Photo Library: OUG 84-35/36 A

Israeli-occupied territories, 1981: After handing a woman a proxy signed by her husband in jail, an ICRC employee enquires about the family’s needs. ICRC/Jean-Luc Ray, ICRC Photo Library: ISRAEL 81-6/304

Uganda, March 1984: Together again! ICRC/Liliane de Tolédo, ICRC Photo Library: OUG 84-35/36 A

Sunday, 18 November 1979: 350 workmen recruited by the ICRC immediately start felling trees, clearing the ground and unloading hundreds of bamboo poles delivered by truck. In a matter of hours construction is well under way.

ICRC/Gérard Leblanc, ICRC Photo Library: THAI 1979-D 14/12
Wednesday, 21 November 1979: The first refugees arrive at Khao-I-Dang hospital; construction work is not yet finished but all essential services are already available.

ICRC/Gérard Leblanc, ICRC Photo Library: THAI 1979-18/22

Monday, 19 November 1979: The basic structure of the refugee camp gradually emerges.

ICRC/Gérard Leblanc, ICRC Photo Library: THAI 1979-15/4

Indo-Pakistan conflict: Providing shelter for displaced persons in Bangladesh, December 1972–January 1974. The displaced instal themselves as soon as the land has been staked out, with the result that ICRC workmen have to build the shelters around their future inhabitants. ICRC/Frédéric Steinemann, ICRC Photo Library: HIST 3081/31
Lebanese civil war: Unloading the Kalliopi in the port of Beirut, February 1977.
ICRC/Gérard Leblanc, ICRC Photo Library: LIBAN 1977-58/24
Ethiopia, 1988: ICRC convoy on the road from Asmara to Senafe, each truck carrying 22 tonnes of food. ICRC/Thierry Gassmann, ICRC Photo Library: ETHI 88-181/25

Sudan, 1989: Khartoum airport: Aircraft chartered by the ICRC to deliver relief supplies to the stricken population in southern Sudan. ICRC/Yannick Müller, ICRC Photo Library: SOUD 89-100/19
Civil war in Nigeria, 1967–70: In secessionist Biafra a mother and child arrive at a sick bay, where they will be fed and cared for under the supervision of an ICRC doctor, 10 April 1969. P. Renkewitz, ICRC Photo Library: HIST 3076/17

Civil war in Nigeria, 1967–70: Food distribution in the N’Kalagu area. ICRC/R. Burgy, ICRC Photo Library: BIAF 39/10 A
Indo-Pakistan conflict, 1971: Rice being distributed to displaced persons in Rangpur, Bangladesh. ICRC/Jean-Jacques Kurz, ICRC Photo Library: INDO-PAK 1971-52/37
Sudan: Assessing a child's nutritional status by means of the Quac-stick method (ratio between height and upper-arm circumference), Wau, 14 August 1986. ICRC/Thierry Gassmann, ICRC Photo Library: SOUD 86-52/10
Angola, 1985: Women receiving flour rations in the Ganda area. Each beneficiary receives a card and shows it whenever relief supplies are handed out. ICRC/Yannick Müller, ICRC Photo Library: ANGO 85-179/20

Somalia: Children receiving hot meals in one of the 900 community kitchens supplied and run by the ICRC with the help of the Somali Red Crescent Society, 20 November 1992. ICRC/Fiona McDougall, ICRC Photo Library: SOMALIE 1992-90/27

Civil war in Laos: Meo refugees from Xien-Khuang receive clothes, mats, blankets, mosquito nets and kitchen utensils, distributed with the help of local Red Cross workers, 13 May 1951. ICRC Photo Library: HIST 3081/20
Liberia: Sinking a well in Monrovia, 1 December 1990. ICRC/Roland Sidler,
ICRC Photo Library: LIBERIA 1990-9/26

Sudan 1989: ICRC staff vaccinating cattle. ICRC/Fred Grimm,
ICRC Photo Library: SOUD 102/30 A
Young Cambodian refugee in a reception centre in Thailand, December 1979.
ICRC/Gérard Leblanc, ICRC Photo Library: THAI 79-34/18
internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.24

So in the view of the Court, the crucial question was not whether humanitarian assistance was given with or without the agreement of the government of the state concerned, but whether it conformed to the principle of impartiality. If the assistance given by the United States to the rebels in Nicaragua was to be condemned, it was not because the consent of the government in Managua had not been obtained, but because the aid was not given impartially.

Undiscerning application of the principle of impartiality could, however, result in accusations that Red Cross institutions perpetuate armed conflicts by supporting both parties. Such accusations are completely unfounded. Conflicts are not prolonged by humanitarian aid, but by supplies of arms and munitions.

It is nonetheless essential not to lose sight of the principle of neutrality, which enjoins the Red Cross not to take any part in hostilities. Red Cross assistance must not reinforce the military potential of either belligerent, or fall into the hands of the fighting forces.

The need to abide by this principle is constantly borne in mind, and its application has given rise to many difficulties. Thus in the Palestine conflict, Article 8 of the truce agreement concluded on 9 June 1948 between the Arab and Israeli authorities, under the auspices of the United Nations mediator, stipulated that relief for the civilian populations in the areas which had seriously suffered from the fighting, such as Jerusalem, should be administered by the ICRC in such a way that reserves of stocks of essential supplies should not be substantially greater or less at the end of the truce than they were at its beginning.25

The ICRC delegation had not been involved in the negotiations leading to that agreement. It decided that the principle of neutrality did not allow it to take part in supplying food for a civilian population which was intermingled with fighting forces. The delegation therefore refused the mandate envisaged for it and confined its assistance to supplying the hospitals, whereas United Nations observers took charge of supervising supply convoys to Jerusalem.26

Similar difficulties arose on other occasions. In July 1980, for instance, the ICRC decided to cease taking part in food distributions on the Khmer-Thai border to the south of Aranyaprathet because no agreement on separating combatants from civilians could be reached.27

Clearly, the Fundamental Principles of the Red Cross and Red Crescent have a practical bearing which no Red Cross institution, least of all the International Committee, can afford to ignore. Besides corresponding to the Movement’s humanitarian ideals they are necessary to its operations, as respect for the fundamental principles will in the end lead both sides to
recognize that Red Cross relief operations are humanitarian, impartial and neutral, and respect them for being so.

This raises the question of how these principles are to be applied. To make sure they are effective, the ICRC has established the following three operational rules, which are firmly based on the fundamental Red Cross principles and form part of its instructions to ICRC delegates:

a) All relief operations must meet needs identified by the ICRC’s own delegates.
b) ICRC delegates must take part in distributions.
c) A report on each distribution must be compiled for donors.

Experience has shown that these three operational rules enable the ICRC to ensure that relief supplies do in fact reach those who need them.

There is no question of pernickety, suspicious supervision. That would only hold up the relief operation and give offence. The aim is merely to supervise its progress sufficiently to prevent losses, wastage and petty theft, so that the ICRC can be sure that the relief supplies really are reaching the victims they are intended for.

Such supervision is in the interest of the victims, the donors, the institutions distributing relief supplies and the belligerent whose nationals are to receive them. In modern war, that party is likely to be accused of the most reprehensible forms of misappropriation, and its denials will not be believed. To forestall any controversy the ICRC must therefore be able to see for itself, and if necessary confirm, that the consignments have been correctly used.

Experience has also shown that donors are generally more inclined to maintain their support and make further donations if they have convincing evidence that the first consignments have been put to proper use. Doubt or argument about this will deter any donor, however willing.

Some outside supervision is therefore necessary. It is an integral part of any relief operation, and is indeed an absolute prerequisite for operations to take in assistance to a blockaded or besieged population.

Such situations will now be considered.

3. Blockades

Throughout the ages, belligerents have endeavoured to intercept supplies intended for their enemy so as to deny it the resources it needs to continue the war. Economic warfare is a legitimate form of war intended to weaken the enemy’s economic and military potential, but it does not discriminate between combatants and non-combatants. The Red Cross has therefore done all it could to attenuate its effects on the civilian population.

The question of relaxing a blockade arose in the First World War, when neutral relief operations were made more difficult by the increasingly severe
restrictions imposed by the Allies, and was discussed at International Red Cross Conferences between the two world wars.

Throughout the Second World War the ICRC sought to obtain the British government’s authorization for relief consignments for civilian populations to pass through the blockade. Its negotiations were not very successful; the only exceptions made by the British government were for the relief operation in Greece and the dispatch of supplies to the Dodecanese, the Channel Islands and the ‘pockets’ on the Atlantic coast of France. No general suspension of the blockade was allowed in aid of the civilian population of occupied Europe, nor was any exception, either general or particular, made on behalf of any enemy civilian population.

Nevertheless, the possibility of relaxing the rules of blockade in aid of the most vulnerable categories of people had to be addressed. It was discussed at the Seventeenth International Conference of the Red Cross, held in Stockholm in August 1948, and by the Diplomatic Conference of 1949.

Rarely did the stark contrast between humanitarian aims and military necessity emerge as clearly as in these discussions. There was indeed a desire to protect non-combatants from the effects of a blockade, especially non-combatants making no direct or indirect contribution to the war effort, but the delegations of the naval powers stressed the danger that relief supplies might be diverted from their proper use and that any supplies arriving from abroad could release resources that would be used for war production or in military operations. Some delegations urged that it should be an absolute obligation to grant free passage to relief consignments. Others equally resolutely opposed this. In the end the Diplomatic Conference adopted a compromise obliging the blockading power to allow some relief consignments to pass freely, provided it was satisfied that they would not be diverted from the purpose for which they were intended. This is expressed in Article 23 of the Fourth Convention:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

a) that the consignments may be diverted from their destination,
b) that the control may not be effective, or
c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.
The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.32

Like any compromise, Article 23 came in for more than its share of criticism. It was even objected that the blockading power’s right of supervision made nonsense of the obligation to grant free passage, and that the whole article was ‘nothing more than a collection of fine phrases’.33

That criticism appears to be without foundation. Like any other treaty provision, Article 23 has to be interpreted and applied in good faith. In no circumstances could the blockading power use its right of supervision under paragraphs 2 and 3 of that article to evade the obligation, laid down in paragraph 1 thereof, to allow free passage.

Application of the article nevertheless raises many difficulties which, despite all that has been said to the contrary, are due more to conflicting interests than to clumsy drafting. The civil war in Nigeria brought these difficulties to the surface and induced the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law to reconsider the whole question.

The Conference proclaimed loud and clear that ‘starvation of civilians as a method of warfare is prohibited’,34 but hastened to add that this declaration did not change the law of naval blockade,35 thereby singularly reducing its scope.

The Conference also adopted several provisions designed to amplify Article 23 of the Fourth Convention. First, it enlarged the circle of beneficiaries of relief operations to include categories other than young children, expectant mothers and maternity cases, making it possible in theory to extend relief operations to the whole of the civilian population whilst respecting the priorities established by the Fourth Convention. Secondly, the Conference accepted a wider definition of relief supplies to be allowed through the blockade, to include food, medical supplies, clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population, as well as objects necessary for religious purposes.36 Relief supplies of this kind intended for a civilian population can no longer be described as contraband of war.

Paragraph 2 of Article 70 governs the free passage of relief consignments, as follows:

The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
Paragraph 3 of Article 70 provides for supervision of consignments and their distribution as follows:

The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

At first sight Article 70, paragraph 2, of Protocol I appears to drive a coach and horses through blockade practice, in that relief consignments must be allowed free passage even when they are intended for an enemy civilian population. The blockading power will, however, undoubtedly point out that paragraph 1 of that article makes such consignments subject to the agreement of the parties concerned!

One wonders, therefore, whether the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law did not adopt a lame decision that merely incorporates disagreement instead of overcoming it. It is surely significant that two of the major naval powers – the United States and France – have not yet ratified Protocol I. Obviously, whether and how a blockade can be eased is still an open question.

Since humanitarian law failed to find a really satisfactory answer in the case of international armed conflict, the difficulties will, as can be well imagined, be even greater in a non-international armed conflict. This will now be discussed.

* *

Article 23 of the Fourth Convention and Article 70 of Protocol I apply *ipsos jure* only to international armed conflicts. In non-international armed conflicts there are two possible situations: either the government of the country has proclaimed a blockade of rebel-held coasts and ports, or it has not made any such proclamation.

Legal opinion and state practice agree that naval blockade implies a recognition of belligerency. In fact, the imposition of a blockade brings into effect an important chapter of the law of war. It is moreover a grave encroachment on the rights of other states to freedom of the seas and violates the principle that the state under whose flag a vessel is sailing has sole jurisdiction over that vessel. Any such encroachment would be inadmissible outside a state of war. More generally, no government can claim belligerent rights for itself if it denies that a state of belligerency exists and
refuses to recognize that the adverse party is entitled to exercise the same rights.

The immediate result of a recognition of belligerency by the government of a country torn apart by civil war is that most of the laws and customs of war become applicable, hence also the whole of humanitarian law except for the provisions relating to Protecting Powers and occupied territory. Article 23 of the Fourth Convention then applies and, if the state concerned is a party to Protocol I, so does Article 70 of that Protocol.

If there has been no recognition of belligerency and blockade is by land only, the only treaty provisions immediately applicable are Article 3 of the 1949 Conventions, and Protocol II if the state concerned is a party thereto.

Article 3 stipulates that ‘Persons taking no active part in the hostilities … shall in all circumstances be treated humanely’ and that ‘The wounded and sick shall be collected and cared for’, but does not provide specifically for relief operations for the civilian population. Protocol II also states that ‘All the wounded, sick and shipwrecked … shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition’, and that ‘Starvation of civilians as a method of combat is prohibited’. There is, however, nothing in Protocol II that obliges either party to the conflict to allow the free passage of relief supplies intended for a civilian population controlled by the adverse party. Accordingly, only by virtue of its right of humanitarian initiative and the general provisions just mentioned can the ICRC demand some relaxation of the rigours of a blockade imposed by either party. There is therefore every reason to fear that the wounded and sick will not be given the medical care and attention required by their condition and that starvation will continue to be used as a method of combat.

* 

Article 4 of the Declaration of Paris of 16 April 1856 proclaims that ‘Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy’. This provision codifies the already existing rule that ‘paper blockades’ – mere declarations of a blockade – have no legal effect.

In fact, blockade has only exceptionally been used as a weapon since 1945 and most of the blockades declared in international armed conflicts since the Second World War did not fulfil the condition that they must be effectively maintained. The naval powers did not recognize them as valid, so the question whether Article 23 of the Fourth Convention had to be implemented did not arise.

Blockades appear to have been validly declared on only two occasions:

- the Nigerian civil war (1967–70);
- the Gulf War (1990–1).
As soon as the Eastern Region of Nigeria declared its independence under the name of ‘Republic of Biafra’ on 30 May 1967, the Federal Government of Nigeria decreed a blockade of the coasts and ports held by the insurgents. The interception on 10 July 1967 of the Panamanian vessel *Kastel Luanda* showed that the federal blockade was effective, and its validity was unquestioned thereafter. After failing to penetrate into the heart of the Ibo country, the federal army encircled the secessionist territories and gradually cut them off from the Cameroon border and then from the sea. The capture of the main Biafran harbour of Port Harcourt on 19 May 1968 left them completely beleaguered. From then on the naval blockade was reinforced by a land blockade.

Biafra was thus cut off from the rest of the world and seemed fated to collapse within weeks. Instead, its final ordeal lasted more than eighteen months.

As soon as the secession was proclaimed the ICRC contacted the Federal Government of Nigeria and the authorities in Biafra. Both pledged to respect the Geneva Conventions. The Committee opened a delegation in Lagos and another in the Biafra enclave and began a limited and almost exclusively medical aid operation on both sides of the front. In July 1967 the ICRC dispatched standard kits of medicines and dressings to Nigeria and decided to send out two surgical teams seconded to it by the Swiss Red Cross, one to work in the territory held by the federal forces and the other in secessionist territory.

But how were its personnel and relief supplies to reach the secessionist enclave? The need to find a solution became more and more pressing as the war dragged on and starvation spread in encircled Biafra. Although this was clearly a non-international armed conflict, the matter was considered in the light of Article 23 of the Fourth Convention, which all the parties agreed to go by and whose relevance was never seriously contested.

Both the Federal Government and the secessionist authorities had consented in principle to a relief operation in aid of the wounded and the civilian population, yet the practical arrangements for it proved extremely difficult to settle.

There were three key issues: the choice of a base for the operation, the means of access, and supervision.

The secessionist authorities wanted to avoid giving the impression that they were subordinating themselves to the federal authorities again, through the intermediary of the ICRC. They therefore insisted that the ICRC should set up an operational base in a third country. For the opposite reason, the Lagos government insisted just as strongly that the operational base should be in federal territory.

Agreement on means of access proved just as difficult. For reasons of military necessity the Biafra authorities would not agree to a land or river corridor, which the ICRC would in any case have been unable to supervise. Discussion therefore centred on an airlift.
To obviate any confusion between planes chartered by charitable organizations and those of the hotchpotch of traffickers flying arms and munitions by night to the Biafra enclave, the Lagos government demanded that relief consignments should travel by day. This the secessionist authorities flatly refused, contending that it was essential for them to conceal their airports – which were the lifeline of Biafra – and protect them during the daytime, lest they be attacked by the Nigerian air force.

There was also total deadlock over supervision. The Federal Government agreed to leave the ICRC to supervise distributions, but insisted on satisfying itself – as it was entitled to do under Article 23 of the Fourth Convention – that the goods to be allowed through the blockade would not benefit the enemy war effort. The secessionist authorities would not agree to federal supervision lest it should again bring Biafra under the dominance of the Lagos government, from which it had broken free and was now resisting by force of arms.

The ICRC tried in vain to reconcile the belligerents’ contrary demands. After prolonged negotiations the Lagos government declared that it would tolerate any flights that the ICRC might make at its own risk and peril. This was less than the formal agreement the ICRC had hoped for, but enough for it to set up a shuttle service by air between the Spanish colony Fernando Po and Port Harcourt. Flights were by night and cargoes being loaded were checked by the Nigerian Consul in Santa Isabel.

The capture of Port Harcourt led to the exodus of hundreds of thousands of refugees, greatly increasing the need for relief supplies and the problems of opening a ‘humanitarian corridor’. A large-scale medical operation, and above all regular arrivals of large quantities of food, were essential to the survival of the civilian population uprooted by the war.

The ICRC therefore had no choice but to step up its airlift to cope with the greater numbers of victims, but at the risk of conflicting with the military requirements of the Federal Government. On 4 November 1968, the Lagos government told the ICRC that it would no longer tolerate night flights. The ICRC was then torn between abandoning the war victims and entering on a collision course with the blockading power. It resolved to continue its mercy flights. In the spring of 1969 it expanded them still further, but because of the military deadlock there was then a swelling wave of antagonism in Lagos against charitable organizations, which were accused of prolonging the conflict by supplying Biafra.

At dusk on 5 June 1969, a Nigerian fighter plane shot down a transport plane made available to the ICRC by the Swedish Red Cross; the pilot and crew perished. Immediately afterwards the Federal Government reiterated its opposition to night flights and warned the Committee not to violate its airspace. The ICRC, judging that it was bound by the Conventions and could only bow to the Lagos government’s formal opposition, suspended its flights to Biafra while endeavouring to reach an agreement that would satisfy the diverging contentions of the warring parties. It failed. The
Committee could not resume its relief consignments, and on 10 January 1970 Biafra fell.

The ICRC had nevertheless managed to make more than 2000 flights to the Biafra enclave, taking in over 21,000 tonnes of food and relief supplies. These were distributed at some 500 distribution centres, forty-nine nutrition centres and 745 refugee camps. By 5 June 1969, when the flights ceased, the number of beneficiaries exceeded one and a half million. The ICRC delegation also ran seven hospitals and sixty-four infirmaries housing about 15,000 sick and wounded, a prosthetic workshop and a centre for the rehabilitation of disabled persons.

In federal territory, the ICRC took in consignments of over 90,000 tonnes of food and relief supplies and thus gave regular assistance to more than one million people, particularly in areas near combat zones. ICRC medico-social teams treated more than 30,000 patients.

This exceptionally large-scale relief operation would have been impossible without the active support of the League and many National Red Cross and Red Crescent Societies, foremost among them the Scandinavian Societies, and of UNICEF and several governments.

Coming as it did at the end of the Cold War, Iraq's invasion of Kuwait led to the restoration of collective security mechanisms which had been in abeyance since at least the Korean War, if not the war in Ethiopia.

The United Nations Security Council condemned the Iraqi coup de force on the day it occurred (2 August 1990), and demanded the immediate withdrawal of Iraqi armed forces. On 6 August, the Security Council, acting under Chapter VII of the United Nations Charter, decided to prohibit all imports from Iraq and occupied Kuwait, all exports to those countries and any financial transactions with them or with people on their territory. The prohibition did not, however, include 'supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs'. The Security Council also established a subsidiary committee to monitor implementation of those measures.

In Resolution 665, adopted on 25 August 1990, the Security Council authorized the use of naval force, if necessary, 'to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661'. While each state was individually responsible for monitoring implementation of the embargo established under Resolution 661, Resolution 665 authorized each of Kuwait's allies with a naval force to intercept any ship headed for or coming from Iraq or occupied Kuwait, no matter what flag it was sailing under. Resolution 665 therefore authorized the establishment of a naval blockade, although that specific term was not used. On 4 September 1990, the American navy intercepted the Iraqi ship Zanubia, demonstrating that the blockade was effective.
The Security Council’s decisions brought the ICRC face to face with a number of particularly thorny issues compounded by the humanitarian needs resulting from the invasion and occupation of Kuwait.

The first was to determine which law was applicable. Although the blockade was the consequence of an armed conflict which had broken out on 2 August 1990 between Iraq and Kuwait, there was no state of war between Iraq and the Security Council members who had authorized the blockade. Nor did any such relationship exist between Iraq and the blockading powers, Iraq having decided not to attempt to break the blockade by force.

The ICRC could not give the impression that it had lost all hope of peace and invoke the provisions of the Geneva Conventions when the majority of governments and a broad section of public opinion continued to believe that a peaceful settlement would be found to the crisis. Nor could it refer to the existence of an armed conflict, since the term had been rejected by both Iraq and the states taking part in the embargo and the blockade. On the other hand, the ICRC could not simply dismiss the consequences, in humanitarian terms, that the blockade was sure to have for the people of Iraq and occupied Kuwait.

The ICRC's conclusion was that the provisions aimed at protecting the civilian population from the adverse party in time of war should be respected a fortiori in the event of a blockade outside a state of war. So although Article 23 of the Fourth Convention was not applicable de jure, since there was as yet no state of war between Iraq and the blockading powers, for precisely that reason its humanitarian imperatives had to be respected within the framework of the measures taken by the Security Council.58

The question of the law applicable in the event of incompatibility of the Security Council decisions with the provisions of international humanitarian law never arose, since Resolution 661 imposing the embargo made an exception for supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs. These exceptions brought the Security Council decisions in line with humanitarian law, and as it could be assumed that the members of the Security Council had had no intention of violating their obligations under that law, the ICRC considered that the resolutions establishing the embargo and the blockade were to be interpreted in the light of its provisions. This was never contested by the Security Council committee set up to monitor implementation of the sanctions (known as the Sanctions Committee).

Lastly, the Security Council’s decisions gave rise to a new situation on which the ICRC had to take a stance. Obviously, the ICRC could not disregard the decisions regularly taken by the Security Council by virtue of the powers conferred on it by the international community, nor could it play the role of blockade runner. It was equally impossible for the ICRC to act, as certain states wished it would, solely as a humanitarian arm of the Security Council. The ICRC resolved this issue by drawing attention to the relevant
requirements of humanitarian law and the Fundamental Red Cross and Red
crescent Principles.

Humanitarian law does not prohibit blockades, but it makes an exception
for certain goods and categories of victims. The ICRC did not fail to point
this out.59

Under the fundamental principles, the ICRC was obliged to act independ-
etly, to make its services available impartially to all the states concerned
and to show equal concern for the fate of all the victims of the crisis resulting
from the invasion of Kuwait and its consequences: Kuwaiti prisoners, the
population of occupied Kuwait, foreign nationals being held against their will
in Iraq or Kuwait, and civilians affected by the blockade in Iraq and Kuwait.

The ICRC therefore took a comprehensive approach. It sought to address
all questions of humanitarian concern resulting from the crisis that flared on
2 August 1990, and offered its services to the Iraqi authorities accordingly.
With regard to the blockade, it decided to contact the Sanctions Committee
and the states taking part to remind them of the law applicable and to obtain
their agreement to certain exceptions for particularly vulnerable groups of
people; the ICRC even offered, under certain conditions, to monitor the
loading of ships authorized to transport relief supplies to Iraq and Kuwait
and to put escorts on board to certify that the ships had not called at any
ports or loaded any unauthorized goods while en route; firstly, the ICRC was
willing, at the request of the parties concerned, to monitor food distributions
with a view to guaranteeing that the food exempted from the blockade was
distributed to the intended recipients and through the distribution channels
agreed by the parties (maternity hospitals, schools, dispensaries, and so on).
In return, the ICRC expected the Iraqi authorities to give it the facilities
required to set up such an operation, such as visas for its delegates, freedom
of movement in Iraq and Kuwait, and communication facilities.60

The ICRC decided to be completely open with the Sanctions Committee,
and through it the Security Council, informing them of all its efforts to help
the populations affected by the embargo and the blockade, but without
asking for authorization to perform the tasks assigned to it by the inter-
national community to protect the victims of war.

These proposals were submitted to the Iraqi authorities during missions by
the Delegate-General for the Middle East and North Africa, and later by the
ICRC President, to Baghdad in August and September 1990. The last points
were being finalized, and indeed a draft agreement was ready to be signed
when, for reasons which remain unknown, the Iraqi authorities suddenly
broke off negotiations.61

The rest is history. On 29 November 1990, a new Security Council resolu-
tion demanded that Iraq withdraw from Kuwait and authorized the use of
force if Baghdad had not implemented previous resolutions before 15 January
1991.62 Hostilities resumed on 17 January, turning the blockade ordered by
the Security Council into a belligerent blockade to which Article 23 of the
Fourth Geneva Convention was fully applicable.
The air strikes and ground offensive immediately gave rise to extensive needs for assistance, in particular for medical supplies and drinking water, while at the same time rendering any relief operation an extremely difficult and perilous venture. Air space was closed, the roads were cut, the bridges destroyed and communication practically impossible. The ICRC delegation in Baghdad was still open, but it had been cut off from the rest of the world within hours after the fighting started. The ICRC’s requests throughout the autumn for permission to import a radio transmitter or other means of telecommunication had been turned down flat; the delegation had thus been left with only phone and fax lines, and the country’s telephone exchanges were obliterated in the first air raids during the night of 16 to 17 January. While the most advanced technology was being used to conduct the air war, the delegation was obliged to fall back on couriers, a throwback to the previous century.

Meanwhile, the wounded were arriving at hospitals, the civilian population had no electricity or drinking water, and supply lines were severed. In spite of the air strikes and the lack of means of communication, the ICRC managed to organize a first convoy which crossed the border from Iran to Iraq on 31 January 1991 with 19 tonnes of relief supplies, including 15 tonnes of medicines and medical material. The convoy had been previously notified to all the warring parties and to the Sanctions Committee. Other convoys reached Baghdad on 9 and 19 February 1991.

Hostilities were suspended on 28 February 1991, opening the way for a vast ICRC relief operation and revealing the true extent of the disaster facing the Iraqi population. In all built-up areas, the damage inflicted on power stations had paralysed water pumps, disrupted distribution systems and resulted in clogged sewers. In the space of a few days, a largely urbanized society, accustomed to the comforts of modern life, was thrust back into the Middle Ages. The inhabitants of cities and towns had no choice but to fetch water from the rivers, into which refuse and waste water were being dumped. It seemed inevitable that epidemics would break out when the hot weather returned.

The ICRC’s delegates realized the seriousness of this threat long before military operations ended. They had seen the inhabitants of Baghdad fetching the water they needed for drinking and cooking from the Tigris River. They had visited neighbourhoods flooded by burst sewers. An ICRC sanitary engineer had made an initial assessment of the state of the water conduits, enabling the ICRC to launch an urgently required relief operation.

As soon as hostilities were suspended, the ICRC brought three mobile units to purify water (waterlines) into Iraq. Each unit was used to filter 30,000 to 80,000 litres of water per day and package it in one-litre plastic bags, essentially for hospitals. At the same time, the ICRC imported the material required to get water distribution systems going again, including electric generators to run the pumps, fuel, spare parts to repair existing equipment and disinfectants (chlorine and aluminium sulphate). The operation started in
Baghdad and was later extended to Iraq's main towns in the south, in particular Karbala, Najaf, Nasiriyah and Basra.67

At the same time, the ICRC set up a vast medical aid operation both for the war wounded and for the victims of the epidemics that were beginning to spread. Hospitals and dispensaries were provided with medicines and other medical supplies; medical teams made available by National Red Cross or Red Crescent Societies worked in Baghdad's hospitals, replacing the foreign doctors who had had to leave Iraq and the Iraqi physicians who had been sent to the front.68

All the relief supplies imported had first been notified to the Sanctions Committee, which in no way hampered the ICRC's work. It agreed in particular to consider all the relief supplies used to repair the water distribution systems – including the disinfectants – as medical supplies which were exempt from the embargo.69

In spite of the heat later in the year, the diarrhoea, typhoid and cholera epidemics that threatened to ravage southern Iraq and would certainly have spread to neighbouring countries were contained and brought under control. Before summer ended, the average number of admissions to hospital was practically the same as in previous years. There can be no doubt that this was largely thanks to the ICRC, which thereby helped to protect the Iraqi population from a disaster which could have taken a higher toll than the war itself.

No sooner was the international war over than civil war broke out. On 1 March the Shi'ite population in southern Iraq rose up against the central government, while the Kurds seized control of the mountainous regions in the north. Both uprisings were brutally repressed, in March in the south and in April in the north, forcing hundreds of thousands of people to seek refuge in Iran and Turkey. Iran welcomed them with open arms, but Turkey, which had already had to absorb several waves of refugees, closed its borders. Tens of thousands of men, women, children and elderly people found themselves in desperate plight, stranded in mountainous border regions without shelter or supplies and suffering the ravages of snow, cold and inadequate hygiene.70

Despite the embargo, which had been maintained, the ICRC was able to organize large-scale relief operations, first for the countless casualties pouring into Baghdad's hospitals, then in the north and south of the country.

In early April, the Iraqi government authorized the ICRC's delegates to move freely in Iraqi territory, including areas held by the insurgents.71 While other humanitarian organizations came to the aid of Kurdish refugees in Iran and Turkey, the ICRC decided to concentrate its efforts on those in Iraq. It opened offices in Karbala, Najaf, Nasiriyah and Basra in the south, and in Dohuk, Arbil and Sulaymaniyyah in Iraqi Kurdistan; these offices were used by its delegates as bases from which to reach displaced persons in the border areas. The aim was to provide emergency aid to displaced persons on the spot and have a more developed structure in the main towns so as to facilitate the refugees' return.72
ICRC action took the following form:

- a medical operation to refurbish hospitals that had been ransacked during the revolt and its repression, and the opening of a surgical hospital and several dispensaries in regions where delegates had found large groups of refugees;
- a public hygiene operation to protect wells from pollution and construct water distribution systems, sewers and latrines;
- an emergency food operation to distribute foodstuffs and cooking utensils;
- distributions of clothing and tents, and the setting up of veritable refugee camps in certain border areas, such as Shaklawa and Penjwin.73

By 30 May 1991 the ICRC delegation, thanks to the active co-operation of the Iraqi Red Crescent and of many National Red Cross and Red Crescent Societies, had distributed 2480 tonnes of food, 12,500 sets of cooking utensils, 77 tonnes of clothing, 2000 tents and 133,000 blankets.74

However, the ICRC refused to take part in Operation Provide Comfort, launched by the United States and its allies for Kurdish refugees in Iraq’s extreme north, since it was a military operation undertaken without the consent of the Iraqi government.75 The ICRC quite rightly considered that it could not expand its operations on the basis of an agreement with Baghdad and at the same time take part in an operation to which the latter was opposed.76 Moreover, the ICRC requires of states that they comply with humanitarian law; it can hardly do any differently itself. It must be borne in mind that humanitarian law is fundamentally based on the agreement of states, given either in advance, when the state becomes party to the Geneva Conventions and their Additional Protocols, or on a case-by-case basis, when a situation arises which was not foreseen when those treaties were concluded.

By the end of the year, the ICRC had brought 27,400 tonnes of relief supplies worth 49 million Swiss francs into Iraq, as well as medical supplies worth 20 million francs. To transport them from Amman to Baghdad, the ICRC had organized 159 convoys comprising a total of 1349 trucks.77

But above and beyond those relief operations, should not the ICRC have spoken out against the very principle of maintaining a food blockade that continued to inflict suffering on civilians, given that active hostilities had ended and that Kuwait, whose occupation had led to the embargo, had been liberated? The price of food was rising steadily, many products were simply not to be found, and the rations of hospital patients had been cut by half. Nutritional deficiency diseases practically unknown in Iraq before the war were starting to appear, in particular marasmus, often accompanied by oedema; these diseases affected mainly children.78 A direct witness to the privations endured by the Iraqi population, the ICRC was perfectly aware that it did not have the means to feed the entire population of a country of 18 million inhabitants. But its role was not to take a political stance either. The ICRC therefore decided, without commenting as to the lawfulness of maintaining economic sanctions, that it would alert the international commu-
nity and draw the attention of the Sanctions Committee to the effects of the food blockade on the Iraqi civilian population. On 19 March, it announced that it foresaw a serious food shortage in Iraq and declared that ‘wider action [was] urgently needed to avert a major nutritional crisis in the stricken country’; it also sent a special mission to New York from 18 to 20 March. Its delegates spoke with advisers to the United Nations Secretary-General and with the Chairman and several members of the Sanctions Committee, informing them of the ICRC’s alarming firsthand observations. The latter were corroborated forty-eight hours later by the report of the Secretary-General’s special envoy. On the basis of the ICRC’s observations and those of the Secretary-General’s special envoy, the Sanctions Committee declared that ‘humanitarian circumstances applied to the entire civilian population of Iraq’, requiring the urgent dispatch of food to Iraq. This in fact amounted to a raising of the food blockade.

Thanks to this decision, the countries and organizations wishing to send food to Iraq were able to do so without restriction, and indeed several of Iraq’s allies did. The decision did not, however, allow Iraq to import the food it needed to feed its population. To import large quantities of food, Iraq, which was already heavily indebted, had to obtain the means of payment. Yet its only source of foreign exchange was oil, which remained subject to the embargo and the income from which was heavily earmarked for the war reparations Iraq owed Kuwait. The Iraqi government therefore refused to sell the amounts of oil for which the Security Council had authorized exportation. More than eight years after the fighting ended, the matter has still not been resolved, and the Iraqi population continues to suffer from severe shortages even though the war is long over.

So the embargo and the blockade did not prevent the ICRC from carrying out major relief operations in Iraq, both for the inhabitants of Baghdad and for the populations that had rebelled against the Iraqi government in the north and south of the country. They were conducted with complete transparency, the ICRC keeping the Sanctions Committee constantly informed of its plans and activities. The Sanctions Committee recognized the validity of all the evaluations carried out by ICRC delegates and put no obstacles in their way. At no time did the ICRC meet with a refusal. It was nevertheless able to remain sufficiently distant from the Sanctions Committee so as not to appear as the Security Council’s humanitarian arm or as a ‘humanitarian alibi’ justifying the maintenance of sanctions, which would have tarnished its credibility in the eyes of the Iraqi authorities. Thanks to the support of the National Societies and governments, the ICRC carried out relief operations which went far beyond the provisions of Article 23 of the Fourth Geneva Convention, but which were true to the spirit thereof. Lastly, once the hostilities had ended, the ICRC did not hesitate to alert public opinion and the Security Council to the grave consequences for the Iraqi population of maintaining the food blockade. Its intervention to that effect, which was confirmed in the report by the Secretary-General’s special envoy, led to the
lifting of the food embargo. That easing of sanctions did not, however, have all the effects that might well have been expected of it.

4. Relief consignments for besieged areas

A belligerent who cannot storm an enemy position will lay siege to it to force it to surrender.

A siege, like a blockade, is a kind of stranglehold, a way of forcing the enemy to surrender by choking off its supplies.\textsuperscript{83} It is a legitimate method of war that has been practised from time immemorial. It is, however, a method of war that inflicts terrible suffering on non-combatant civilians trapped in an encircled locality. The commander of a beleaguered garrison will endeavour to reserve most of his food supplies for the fighting troops; civilians will therefore have to undergo even worse privations than they. And the besiegers are not bound to make things easier for the besieged by allowing non-combatants who want to leave the besieged area to cross their lines. Civilians attempting to escape from the rigours of a siege have often been driven back by force of arms.

Civilians caught in the unrelenting grip of a siege may therefore die of starvation for a cause they do not necessarily support. Can anything be done to help them?

This question arose when France was liberated in the summer of 1944. As the German forces collapsed, remaining garrisons were surrounded in several Atlantic and Channel ports: Lorient, St Nazaire, La Rochelle, Royan and Dunkirk. With the belligerents’ consent, the ICRC delivered several relief consignments there for the civilian population.\textsuperscript{84}

The Diplomatic Conference of 1949 did little to endorse this precedent. Article 17 of the Fourth Convention reads:

\begin{quote}
The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.\textsuperscript{85}
\end{quote}

The categories of persons entitled to receive relief consignments are not specified. The consignments may therefore be used for military as well as civilian sick and wounded,\textsuperscript{86} but strict limits are imposed on their contents: only medical supplies are allowed. The belligerents’ obligations are also narrowly confined; they must endeavour to conclude local agreements for the passage to a besieged area of medical personnel, medical equipment and ministers of all religions, but are not required to reach any such agreement if they believe they have good reason not to. The pangs of hunger have always been the besieger's sharpest weapon, and although the cruelty of this custom was undisputed the Diplomatic Conference of 1949 clearly did not intend to abolish it.
The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law appears to have been no less impressed than its predecessor by the plight of civilian victims of siege warfare. Although Article 70, paragraph 2, of Protocol I states that ‘The Parties to the conflict ... shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel ... even if such assistance is destined for the civilian population of the adverse Party’, the first paragraph of that article is a reminder that operations for the relief of the civilian population ‘shall be undertaken subject to the agreement of the Parties concerned’.

In sieges, as in naval blockades, the condition that relief consignments are ‘subject to the agreement of the parties concerned’ may well nullify the obligation, stated in Article 70, paragraph 2, of Protocol I to give free passage to them. When the gulf between humanitarian aims and military necessity is as deep as it is in sieges or blockades, the principle of national sovereignty cannot be given preference – as it invariably was at the 1974–7 Diplomatic Conference – without sacrificing humanitarian interests. In spite of all professions to the contrary, starvation will remain one of the belligerents’ favourite weapons.

The gaunt figures of the Burghers of Calais surrendering to King Edward III the keys of a city worn out by merciless siege are unfortunately not only memories of the past.

The above provisions apply *ipso jure* only to international armed conflicts.

As regards non-international armed conflicts, Article 3 of the Geneva Conventions of 1949 merely states that ‘persons taking no active part in the hostilities ... shall in all circumstances be treated humanely’, and Article 14 of Protocol II begins ‘Starvation of civilians as a method of combat is prohibited’. However, any hopes this provision may raise are at once deflated by the requirement that relief operations for a civilian population suffering undue hardship shall be undertaken ‘subject to the consent of the High Contracting Party concerned’.87 Besieging forces will doubtless find this wording gives them plenty of scope for refusing their consent.

To sum up, both in international and internal armed conflicts the International Committee may, primarily by virtue of its universally recognized right of humanitarian initiative, offer its services in aid of the civilian population of a besieged area.

However, the difficulties involved must not be underestimated. The very narrow legal basis is an unmistakable indication of them. Whatever the supervisory machinery set up and whatever assurances are given, the commander of a besieging force who is requested to allow relief supplies free
passage into a besieged area will always fear that if he does so the defenders will be encouraged to hold out. As events have repeatedly shown, in a siege as in a blockade there is little or no likelihood of reconciling humanitarian aims with military necessity.

The civil war in Lebanon (1975–90) restored siege warfare to the eminent position it occupied until the advent of steel gun barrels and bomber aircraft. Because of the fortunes of war, shifting alliances and intervention by neighbouring states, factions were alternately besiegers and besieged, and ICRC delegates were implored to come to the aid of the inhabitants of beleaguered and destitute towns, villages and neighbourhoods.

Thus, between early April and 30 June 1981 the ICRC delegation, valiantly backed by the Lebanese Red Cross, organized thirty-one relief convoys for the population of Zahle, a town under siege after fierce fighting between the ‘Arab Deterrent Force’ and the Christian militias. For each of these convoys of food, medicines and other medical supplies the ICRC had to negotiate a cease-fire. On the return journey they evacuated from the besieged area a total of 361 wounded, sick, old people and children.88

Similarly, between 12 September and 22 December 1983 the ICRC delegation organized fifty-seven convoys to the Chouf area, where 1756 tonnes of food and 145,000 blankets, together with medical supplies and cooking utensils, were distributed to civilian victims of the clashes. Twenty-one of the convoys went to Deir-el-Kamar, a Christian village encircled by Druze militias, and evacuated more than 6100 persons from it.89

The question of relief supplies for the civilian population became most acute, however, when Beirut was besieged in the summer of 1982. The Israeli army began its invasion of Lebanon on 6 June 1982 and on 14 June laid siege to the western quarters of Beirut, where the PLO fighters had dug themselves in, leaving themselves no line of retreat.90 Supplies for the civilian population and local medical centres were soon urgently needed as refugees flooded in from southern Lebanon and heavy shelling continued.

As early as 20 June the ICRC delegation managed to get its first convoy of medicines and other medical supplies through to West Beirut, with the consent of the authorities concerned. It was later allowed to cross the lines with larger convoys of food and medical supplies, as well as fuel for the hospitals’ electricity generators. A separate authorization had to be obtained for each convoy.

However, on 26 July the Israeli authorities turned back the ICRC convoy and cut off West Beirut’s water and electricity supply. Conditions in the city soon became alarming; shortages were general, public services broke down, and disease was spreading. On 29 July the United Nations Security Council demanded that the Israeli government immediately lift the blockade of Beirut in order to permit the dispatch of supplies to meet the urgent needs of the civilian population and allow the distribution of aid provided by United Nations agencies and by non-governmental organizations, particularly the ICRC.91
The ICRC promptly sent its Vice-President to Jerusalem for talks with the Minister of Defence, and then the Prime Minister. Placing particular emphasis on the plight of the civilian population of Beirut, he demanded that the Israeli forces should stop their bombardment and lift the blockade.\textsuperscript{92} The blockade was indeed relaxed and a relief convoy was again allowed to cross the lines on 7 August. Other convoys followed until the blockade was lifted on 27 August 1982, after the evacuation of the Palestinian fighters.

It was unfortunately impossible, in this extremely turbulent period, to keep exact statistics of these operations. From the information available it is estimated that between 20 June and the end of the blockade the ICRC managed to get about thirty convoys through to West Beirut, carrying between one and two thousand tonnes in all of food, medical and other supplies.\textsuperscript{93}

On other occasions the International Committee met with a flat refusal. An ICRC press release of 19 February 1987 deplored that it had been denied access to the Palestinian refugee camps in Chatila and Borj-el-Brajneh, in the southern suburbs of Beirut, and Rachidiyeh near Tyre, which were then besieged by Amal (Shi’ite Muslim) militia; despite repeated representations to all parties its delegates had been unable to enter the camps to assess their needs and provide the necessary assistance. Whilst deeply regretting that the parties to the conflict were more interested in politics than in solving urgent humanitarian problems, the ICRC declared that it would continue its efforts.\textsuperscript{94}

5. Aliens in the territory of a party to a conflict

Nationals of a neutral state who are in the territory of a belligerent state must expect to share the hardships of the local population. They are not entitled to any special protection from the effects of blockades or economic warfare.

The living conditions of enemy nationals will probably deteriorate even sooner than those of the general population in their country of residence. Even if they are not interned they may be subject to security measures that will make it harder for them to earn a living and may bar them from gainful activity altogether. Their assets may be frozen or confiscated, and they may be excluded from certain professions or placed under house arrest.

Article 39 of the Fourth Convention therefore stipulates that where a party to conflict subjects protected persons to methods of control which result in their being unable to support themselves, and especially if those persons are prevented for reasons of security from finding paid employment on reasonable conditions, the said party must ensure their support and that of their dependants.\textsuperscript{95}

Furthermore, protected persons must in any case be permitted to receive allowances from their home country, the Protecting Power, or relief societies
including the ICRC, as well as any individual or collective relief that may be sent to them.

Since postal services between belligerent states may break down, the Protecting Power or a humanitarian organization such as the ICRC may remit to protected persons any allowances and relief sent to them from their home country. Such allowances and relief will of course not relieve the state of residence of its responsibilities.

During the Second World War the ICRC was able to send relief parcels to civilians of enemy nationality in assigned residence or allowed to live in partial freedom, in particular in Italy and France. Since 1949, however, there has been hardly any occasion to implement these provisions. It would seem that the ICRC has been approached only twice – in the Suez conflict of November 1956, and in the Gulf War (1990–1).

Following the Suez conflict, the ICRC was asked to transfer allowances intended for stateless Jews resident in Egypt, and did in fact organize such transfers. During the Gulf War the ICRC similarly provided material aid in the spring of 1991 for various groups of nationals of neutral, mostly Asian, countries living in Iraq. However, it was unable to do anything to help Kuwaiti nationals in Iraq, whether interned or at liberty, until the hostilities ended on 28 February 1991.

6. The population of occupied territory

Living under the heel of an occupying army is a grim situation. Besides the privations that war entails for the people of any belligerent state and the death and destruction brought by warring armies, the civilian population of occupied territory will be subjected to the security controls imposed by the occupying forces. It will also have to bear the burden of an army of occupation which, as has always been accepted, is entitled to live off the conquered country and draw from it any resources it needs.

The abuses to which such practices gave rise in the Second World War are well known. Although Article 52 of the Hague Regulations stipulated that requisitions in kind and services must not be demanded from municipalities or inhabitants except for the needs of the army of occupation, and must be in proportion to the resources of the occupied territory, Nazi Germany systematically exploited the human and material resources of conquered countries to an extent far beyond the needs of its occupying armies. It did so with complete disregard for the availability of resources and the vital needs of the population. The situation in occupied Greece was particularly critical: such exploitation led to the collapse of the national economy and to an acute famine only slightly alleviated by a huge relief operation under ICRC and Swedish government auspices.

To prevent any repetition of such abuses the Diplomatic Conference of 1949 adopted several provisions defining the obligations of the occupying
power, restricting the right of requisition and paving the way for future relief operations for the population of occupied territory.

The main provision is Article 55 of the Fourth Convention:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

In spite of the reservations restricting their scope, these provisions differ significantly from those of the Hague Regulations. Under the latter, the occupying power’s duty to act went no further than to maintain public order and safety. In economic matters, on the other hand, it was obliged only to refrain from taking action: it was not to alter the basis of taxation or levy requisitions out of proportion to the resources of the occupied territory. If the population of an occupied territory was suffering from starvation, the occupying power was under no obligation to make supplies available to it.

Under Article 55 of the Fourth Geneva Convention, however, the occupying power has the duty, to the fullest extent of the means available to it, of ensuring the food and medical supplies of the population. So it does now have a duty to act, even though this obligation is limited to the means available to it. In many cases, however, it may have no such means – or may lack the political will to put them into effect. The question of outside relief then arises.

Relief operations for the population of occupied territory are regulated by Articles 59 to 62 of the Fourth Convention.

Article 59 defines as follows the obligations of the occupying power and of the states through which relief consignments have to pass in transit:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to
search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

When the population of an occupied territory is inadequately supplied, the first paragraph of this article rules that the occupying power must accept relief operations undertaken in aid of that population, and facilitate them by all the means at its disposal. Similarly, states through which relief consignments must pass in transit are obliged to permit their free passage and guarantee their protection, even when the supplies are intended for the population of territory occupied by the adverse party.

Relief consignments do not relieve the occupying power in any way of its responsibility to provide, to the fullest extent of the means available to it, the population with food and medical supplies. That power may not in any way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.102

- Distribution of the relief consignments must be carried out with the cooperation and under the supervision of the Protecting Power. This task may also be delegated, by agreement between the occupying power and the Protecting Power, to another neutral power, to the International Committee of the Red Cross, or to any other impartial humanitarian body.103
- It is mandatory for such consignments to be exempt in occupied territory from all charges, taxes or custom duties unless these are necessary in the interests of the economy of the occupied territory.104
- Subject to imperative reasons of security, protected persons in occupied territories must be permitted to receive individual relief consignments sent to them.105
- Operations for the relief of civilian internees are subject to special regulations.106

In Article 69 of Protocol I the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law extended the obligations of the occupying power concerning the kind of supplies that power is required to ensure. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies for the population of occupied territory, the occupying power is obliged, to the fullest extent of the means available to it and without any adverse distinction, to ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory, and objects necessary for religious worship. The Conference did, however, maintain the reservation that so severely restricts these obligations, namely that the occupying power is required to discharge them only ‘to the fullest extent of the means available to it’.107
The rules applicable to relief operations for the population of occupied territory underwent no change. The status of personnel taking part in these operations is defined by Article 71 of Protocol I.

Since 1949 there has been no lack of occasions to come to the aid of the civilian population of occupied territory, and in this field the ICRC has had ample practical experience. It carried out many relief operations for the inhabitants of Port Said, occupied by the Anglo-French expeditionary force in the Suez conflict of November 1956; for the population of the Golan Heights, the occupied West Bank, the Gaza Strip and Sinai, all occupied by Israel in the Six-Day War of June 1967; and for the northern part of Cyprus, occupied by Turkish forces in the summer of 1974.

It was, however, the Israeli invasion of southern Lebanon in the summer of 1982 which led to the largest operations, both because of the widespread destruction caused by the war, particularly in Sidon (Saida), and the number of displaced persons. The ICRC at once mounted a large-scale relief operation to take in food and medical supplies to the population of Israeli-occupied southern Lebanon and to people who had fled as the Israeli troops advanced. Two medical teams seconded by the Finnish Red Cross arrived in Sidon on 13 June 1982, and many standard kits of medicines and other medical supplies were distributed to replenish the stocks of the hospitals and clinics in that area. In June 1982 the ICRC gave food aid in the form of family parcels of foodstuffs and cooking utensils to more than 110,000 displaced persons, and in July to as many as 170,000 persons, of whom more than 40,000 were in southern Lebanon. It also distributed blankets and other relief supplies. As the ports at Tyre and Sidon and the airport at Beirut had been closed, relief supplies for Israeli-occupied Lebanese territory had to pass through the port of Haifa or Lod airport. From there they were transported overland to southern Lebanon.

7. Concluding remarks

At first sight, relief operations for the civilian population appear to be an extension of the International Committee’s relief operations for wounded and sick military personnel, prisoners of war and civilian captives, but in fact they raise problems of their own. Four such problems should be mentioned here:

1. The first is a matter of scale. Whatever their number, wounded and sick military personnel, prisoners of war and civilian captives are only a minority of the population of the parties to a conflict. But modern war causes such terrible devastation that most of the civilian population in belligerent states may have to be regarded as war victims, especially in countries where even in peacetime the population lives barely at the subsistence level.
Relief operations have to be organized in proportion to the number of victims. This requires the deployment of considerable logistic facilities, which raises particular legal problems. And whatever precautions are taken, large-scale relief operations tend to arouse suspicion in some quarters and covetousness in others.

2. The next problem is to agree on a division of labour and co-ordinate the work. Whereas the competence of the International Red Cross and Red Crescent Movement to bring assistance to wounded and sick military personnel, prisoners of war and civilian captives, and the special position of the ICRC in that regard within the Movement, are widely recognized, there is no such recognition in relief operations for the civilian population.

Intergovernmental organizations (such as UNICEF, UNHCR, WHO and WFP), the International Federation of Red Cross and Red Crescent Societies, National Societies and a host of non-governmental organizations, either permanent or specially formed for the occasion, will regard themselves as equally concerned and equally competent. Thorny problems as to the allocation of responsibilities and the co-ordination of relief operations are consequently bound to arise.

Unfortunately, identity of aims has not always prevented regrettable competition in fund-raising for operations and friction in carrying them out. Despite the growing demands for international co-ordination of emergency relief operations, in practice it seems ever harder to achieve.

3. There is no difficulty in defining wounded and sick military personnel, prisoners of war and civilian captives. But the dividing line between combatants and the civilian population is usually blurred because combatants tend to intermingle with the civilian population, and civilians take part in hostile activities or simply support the war effort by their work.

People then begin to question the neutrality of aid. How can civilians be assisted without simultaneously provisioning the combatants hiding among them? How can victims be given relief supplies without also benefiting civilians taking part in the war effort?

4. In a siege or blockade, relief operations for the civilian population will certainly conflict with the necessities of economic warfare. Although blockades are not targeted against the civilian population as such, they are nevertheless a form of stranglehold intended to render an enemy state, and therefore its population, helpless by cutting off vital supplies. The contradiction here between humanitarian imperatives and military necessity cannot be overcome, especially since it is morally impossible, as the blockade of Biafra showed, to supply no more than supplementary assistance to a civilian population deprived of the most basic necessities of life.

Ever since Solferino, humanitarian law has developed on the assumption that it was possible to alleviate the suffering of war victims without detriment to the conduct of hostilities. In relief operations for civilian
populations suffering the effects of a siege or blockade, this assumption does not hold true.

The difficulty is all the greater because the circumstances of the contending parties are so dissimilar. In hostilities it can otherwise be assumed that there will be wounded and prisoners on both sides, even if the numbers differ, so that a power that collects and cares for enemy wounded is entitled to expect its adversary to do the same, and any power with prisoners in its hands is also the power of origin of prisoners held by the adverse party. So although the opposing parties are enemies in waging war, they are to some extent partners in implementing humanitarian law. But in a blockade the circumstances of the blockading and blockaded powers are poles apart. There is no common denominator, no community of interests. They can only be opponents.

These problems can be overcome only by pinpointing the victims and their needs and strictly supervising distributions. In sieges and blockades especially, strict supervision is a *sine qua non* for any relief operation in which firing lines have to be crossed; for no blockading power will ever relax its grip unless it is satisfied that relief supplies will indeed go to the victims they are intended for.

The Geneva Conventions have assigned the responsibility for this supervision to the Protecting Powers appointed to safeguard the interests of parties to a conflict. But in most international conflicts since 1949 the belligerents have failed to appoint Protecting Powers, and in internal conflicts there was never any question of appointing them. In practice, therefore, the task of supervising relief distributions has generally been entrusted to the ICRC, particularly when it had itself forwarded the relief concerned.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law should have reconciled practice with positive law by providing a legal basis in the Additional Protocols for ICRC relief operations in aid of the civilian population both in international and in internal conflicts. Unfortunately it did neither. It can only be regretted that current treaty provisions lag so far behind ICRC practice as it has evolved in the field.

Some commentators have suggested that the International Committee should therefore steer clear of relief operations for the civilian population and concentrate on what are said to be its ‘traditional’ activities of protecting wounded, sick and prisoners. This is surely an out-of-date approach that takes the easy way out and ignores developments in positive law. The Geneva Conventions and their Additional Protocols protect civilians just as they protect wounded, sick and prisoners, and therefore give them an equal claim to the attention of the International Committee. An institution such as the ICRC, which exists to prevent and alleviate human suffering wherever it may be found, cannot pick and choose in its humanitarian work.
Notes

1 The biggest relief operation conducted during the First World War was in aid of Belgium. It was not a Red Cross operation, but was mounted by a special committee formed in London and chaired by Herbert Hoover.

2 See Book I, Chapter V, Section 5, above, pp. 96–8.

3 See Book I, Chapter VII, Section 2, for the war between Greece and Turkey, and Chapter IX, Section 7 for the Spanish Civil War, pp. 133–6 and 276–8 above.

4 See Book II, Chapter VIII, Section 8 above, pp. 222–9.

5 See Book II, Part V, Chapter IV above, pp. 658–76.

6 For the legislative history of Article 10 of the Fourth Convention see the documents listed above in note 30 to Chapter III in Book II, Part I, p. 360.


10 Fifteenth International Conference of the Red Cross (Tokyo, 1934), Resolution XXVI; Seventeenth Conference (Stockholm, 1948), Resolutions XVII and XL; Eighteenth Conference (Toronto, 1952), Resolution XII; Nineteenth Conference (New Delhi, 1957), Resolution X.
11 Seventeenth International Conference of the Red Cross (Stockholm, 1948), Resolutions XVII and XI; Eighteenth Conference (Toronto, 1952), Resolution XII; Nineteenth Conference (New Delhi, 1957), Resolution X; Twenty-third Conference (Bucharest, 1977), Resolution VI, Annex, Recommendation E.

12 These subjects are dealt with in greater detail above in Book II, Part II, Chapters IV and V, pp. 416–22 and 447–56.


16 Protocol I, Article 70, paragraph 1.


18 Commentary, vol. IV, p. 96.


20 Articles 1 and 55 of the Charter of the United Nations; Resolution 57 (I) 1946 of the General Assembly establishing the International Children’s Emergency Fund and adopted on 11 December 1946, paragraph 2(b).

21 Minutes of the meeting with Mr Hun Sen, Minister of Foreign Affairs of the People’s Republic of Kampuchea, 14 October 1979, ICRC Archives, file 280 (180).


24 Ibid., p. 125.


28 Strictly speaking, a blockade is a method of warfare peculiar to sea warfare. Charles Rousseau defines it as ‘the measure by which a belligerent State prohibits inward or outward communication between the high seas and the enemy coast, and enforces this prohibition by stopping and seizing vessels contravening it’ (Le droit des conflits armés, Librarie A. Pedone, Paris, 1983, pp. 258–9). More generally, the term covers everything done by a belligerent to interrupt the enemy’s economic relations and prevent imports into, and exports from, any territory under its control. Robert Tucker, The Law of
The ICRC and the Protection of War Victims

War and Neutrality at Sea (International Law Studies, vol. 50), United States Naval War College, Newport (Rhode Island), 1955, p. 285. Unless otherwise stated, in the present chapter the term ‘blockade’ is used in its general sense, and the term ‘naval blockade’ to mean the method of warfare specific to the law of war at sea. This section deals only with the problems raised by the imposition of a blockade in an armed conflict. It does not deal with the humanitarian problems caused by other forms of blockade, such as a blockade declared by the Security Council in a situation other than armed conflict.


34 Protocol I, Article 54, paragraph 1.


36 Protocol I, Article 70, paragraph 1.


38 Castrén, Civil War, pp. 152–8; Siotis, Le Droit de la Guerre, pp. 109–12; Zorgbibe, La guerre civile, pp. 38, 49 and 51–6.

39 Article 7.

40 Article 14.


57 *Keesing’s Record of World Events*, September 1990, p. 37695. American naval forces had already intercepted two Iraqi coastal craft in the Gulf on 17 August 1990; on the following day, two Iraqi oil tankers were forced to turn back; *Keesing’s Record of World Events*, August 1990, p. 37640.


59 Statement by the ICRC President in an interview on the German radio station *Saarländischer Rundfunk*, 24 August 1990, picked up by *Agence France Presse* the same day. ICRC Archives, file 204 (214); *Journal de Genève*, Saturday 25 and Sunday 26 August 1990, p. 3.

60 *Aide-mémoire* of 29 August 1990, annexed to Note no. 241 from the ICRC delegation in Baghdad, 12 September 1990, pp. 4–6, ICRC Archives, file 232 (214-00).

61 Note no. 241 from the ICRC delegation in Baghdad, 12 September 1990, ICRC Archives, file 232 (214-00); Minutes of the Executive Board and Internal information bulletin, August to December 1990.


63 Communication to the press, no. 91/8, 31 January 1991; Internal information bulletin, 4 February 1991. As far as I know, this was the first relief convoy sent into Iraq after hostilities resumed on 17 January 1991.

64 Conflict in the Middle East, Updates nos. 13, 14 and 15, ICRC Archives, file 060/San (222) 1991; Internal information bulletin, 11 and 25 February 1991. Why did the ICRC not organize more convoys during the forty-three days the hostilities lasted? Mainly because of the lack of means of communication either with the Iraqi authorities, who alone could authorize the convoys to cross the border, or outside the country. ICRC operations were slowed down by other factors as well, in particular the fact that it was impossible to use the
Amman-Baghdad road, which was frequently bombed; lastly, the snow blocking the roads and mountain passes in Iran had caused serious delays.


Internal information bulletin, 18 February 1991; Update no. 20 on International Red Cross and Red Crescent Action in the Middle East, 6 March 1991, ICRC Archives, file 060/inf (222) 1991.


Internal information bulletin, 4 and 18 March 1991; Gerard Bise, report on activities, Note BAG 91-R 84 of 3 July 1991, ICRC Archives, file 280 (70).

Letter of 22 February 1991 from Ambassador Hohenfellner, Chairman of the Sanctions Committee, to the ICRC, ICRC Archives, file 130 (222); Internal information bulletin, 4 March 1991.


Internal information bulletin, 8 and 15 April 1991.

Internal information bulletin, 15 April 1991.

Internal information bulletin, 22 April 1991.


Relief Division, material assistance provided in 1991, statistical summaries, 26 June 1992, ICRC Archives, file 280 (00).


Siege, like blockade, is a form of hostile encirclement, or stranglehold. Strictly speaking, the rules of siege warfare are part of the laws of war on land, and the rules of blockade part of the laws of war at sea, but siege and blockade are closely connected and often complement each other. There is no sharp dividing line between them. The terminology is uncertain; for example, the Israeli army’s encirclement of West Beirut in the summer of 1982 has been described both as a siege and a blockade.


For the legal history of Article 17 of the Fourth Convention, see the documents mentioned in note 86 to Chapter I in Book II, Part VI, above, p. 767.

Article 17 of the Fourth Convention is modelled on Article 15, paragraph 3, of the First Convention.

Protocol II, Article 18, paragraph 2.

Relief Operations for the Civilian Population

94 Communication to the press, 10 February 1987, unnumbered, ICRC Archives, file 202 (175); Journal de Genève, Wednesday, 11 February 1987, p. 3.
95 Article 39, paragraph 2.
96 Article 39, paragraph 3.
97 Article 38 (1).
99 Annual Report 1957, pp. 25–7; ICRC Archives, file 233 (43), files I–IV.
100 Internal information bulletin, January to June 1991.
101 Articles 49 and 52 of the Hague Regulations.
102 Article 60.
103 Article 61, paragraph 1.
104 Article 61, paragraph 2.
105 Article 62.
106 Articles 108–12.
107 Protocol I, Article 69, paragraph 1.
108 Protocol I, Article 69, paragraph 2.

References


The following may also be consulted: The Geneva Conventions of 12 August 1949: Commentary, published under the general editorship of Jean S. Pictet, vol. IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, especially pp. 93–8, 177–84, 243–53 and 309–29; Claude Pilloud, Jean de Preux, Yves Sandoz,
PART SEVEN

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND PROTECTING POWERS
INTRODUCTION

No state will sign a treaty if the signatories distrust each other, and no state will respect a treaty unless it has some means of ascertaining that the other party is respecting it as well. Indeed, no state will honour its obligations unless it can satisfy itself that its co-signatories will do the same.

In peacetime, diplomatic missions and consulates inform their governments of the way their host country is fulfilling its obligations towards other states. If it fails to do so, the injured state can uphold its rights through diplomatic channels.

If war breaks out, both parties withdraw their diplomatic and consular missions and direct contact between them ceases. Can any treaty link then survive?

To safeguard its interests and those of its nationals in enemy hands, each belligerent can request a third state acceptable to its adversary to look after them. This state is called a Protecting Power. This practice became more widely established in the second half of the nineteenth century, but the greatest expansion in the activities of Protecting Powers took place during the two world wars.

Obviously, one of a Protecting Power’s main functions in wartime is to look after the nationals of the state whose interests it is protecting. It is consequently a humanitarian activity in line with the concerns of the International Committee of the Red Cross.

The relationship between the tasks and activities of Protecting Powers and of the ICRC must therefore be examined. But first it may be useful to summarize the role and functions of Protecting Powers.

A separate chapter will be devoted to each of the following subjects:

- the mandate of Protecting Powers;
- the relationship between the tasks of Protecting Powers and those of the ICRC;
- the possibility for the ICRC to offer its services with a view to the appointment of Protecting Powers;
- in the absence of a Protecting Power, its possible replacement by the ICRC.
CHAPTER I

THE PROTECTING POWER

1. Origin and development in customary law

Diplomatic protection is as old as diplomacy itself. States have always entrusted their diplomatic and consular agents with the task of protecting their interests and those of their nationals in the state to which those agents were accredited, a function fully recognized by conventional and customary law.1

But this activity is not always confined to protection of the nationals of the sending state, for one state (known as the power of origin) may ask another state (known as the Protecting Power) to safeguard its interests and those of its nationals in a state in which it is not itself represented.

The first instance of this delegated function is found in the sixteenth century, when permanent diplomatic missions became the rule. Only the great powers were wealthy enough to maintain embassies; rather than leave their nationals unprotected, small states therefore asked friendly powers to protect them.2

Such protection extends to foreign nationals in time of war, and especially to persons who have fallen into enemy hands. The practice spread in the second half of the nineteenth century3 and became general in the First World War.4 As a result of negotiations in the autumn of 1914 and the winter of 1914–15 representatives of Protecting Powers were allowed to visit prisoner-of-war camps.5

The Diplomatic Conference of 1929 paid tribute to the role of the Protecting Powers by providing a legal basis for their future activities in Article 86 of the Convention relative to the Treatment of Prisoners of War of 27 July 1929. It reads:

The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the protecting Powers charged with the protection of the interests of the belligerents....6

This provision placed no obligation on the contracting parties but proved to be extremely useful in the Second World War. Most of the belligerents had recourse to the services of a Protecting Power. Thus Switzerland was the Protecting Power for thirty-five states, including most of the great powers – for the British Empire (in eleven states), for France (in seventeen states), for the United States (in twelve states), for Germany (in fifteen states), for Japan
(in fifteen states), and for Italy (in fourteen states); Sweden was the Protecting Power of twenty-eight states including the USSR; and until it entered the war the United States was the Protecting Power for a dozen states.7

Generally speaking, scrutiny by the Protecting Powers was extremely useful, especially as one and the same Protecting Power often represented two enemy powers and could therefore put forward the argument of mutual interest. There were nevertheless major difficulties:

- No rule in the Conventions authorized the Protecting Powers to protect enemy civilians.
- There was no provision for activities of the Protecting Powers in occupied territory. For example, Japan declared all the territories it occupied to be areas of military operations and forbade representatives of Protecting Powers to enter them.8
- The Protecting Powers were not usually allowed to protect the interests of unrecognized governments, such as those in Germany or in German-occupied territory of Allied governments-in-exile.9

Hence the objectives which the International Committee of the Red Cross set itself when, soon after the Second World War, it embarked on the preparatory work that led to the adoption of the new Geneva Conventions. They were:

- to extend the principle of supervision by the Protecting Powers to all the Conventions;
- to make supervision obligatory;
- to arrange for the replacement of Protecting Powers no longer able to act.10

The war had revealed a stark contrast; when the 1929 Prisoners of War Convention had been applied with the help of a Protecting Power its provisions had generally been respected, but where there had been no scrutiny by a Protecting Power major violations had been committed. The Diplomatic Conference of 1949 therefore widely accepted the International Committee’s three objectives. The result was Articles 8/8/8/9 and 10/10/10/11 common to all four Geneva Conventions of 12 August 1949.

2. The legal bases

The status and functions of Protecting Powers are mainly regulated by customary law and by two groups of treaties:11

a) the Geneva Conventions of 12 August 1949 and Protocol I additional thereto; and
It has therefore become usual to distinguish between the ‘Geneva mandate’, covering the functions of Protecting Powers in humanitarian law, and the ‘Vienna mandate’, covering the activities more closely concerned with diplomatic and consular law and practice.

Although this terminological distinction may be of some use for analytical purposes, it has no legal validity, for in customary law the mandate of the Protecting Power is indivisible even though it was later embodied in two different sets of treaties. Moreover, Article 45 of the Vienna Convention on Diplomatic Relations of 18 April 1961 provides that should diplomatic relations be broken off ‘the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State’.

In the event of war, the nationals whose interests must be protected are obviously first and foremost prisoners of war and civilians in the hands of an enemy power; in other words, persons protected by the Geneva Conventions. Clearly, the two mandates largely overlap and the ‘Vienna mandate’ encompasses the ‘Geneva mandate’. That being so, it stands to reason that two things, one of which includes the other, must not be separated because there is in reality no means of separating them. And the wording of Article 8/8/8/9 common to all four Geneva Conventions shows beyond doubt that the legislators of 1949 fully intended to preserve the unity of the Protecting Power’s mandate, for that article stipulates that the new Conventions shall be applied ‘with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict’. The Protecting Power whose responsibility it is to protect the interests of a party to a conflict will therefore also be responsible for protecting that party’s nationals.

Moreover, who would dare to claim that the interests of a state do not include the lives and welfare of its citizens. There is accordingly no break of continuity between the two mandates, nor is there any way of separating one from the other. And no country could, unilaterally and because of a mere terminological distinction, restrict the Protecting Power appointed by an adverse party to activities covered by only one of the two mandates.

However, since the intention here is to show the relationship between the functions of Protecting Powers and those of the ICRC, the following analysis will be concerned primarily with the tasks entrusted to Protecting Powers by humanitarian law.

Their general scope is defined by Article 8/8/8/9 common to all four Geneva Conventions:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.
The Parties to the conflict shall facilitate to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers. The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.\textsuperscript{15}

In the First and Second Conventions, the article’s final paragraph concludes with the following additional sentence: ‘Their activities shall only be restricted, as an exceptional and temporary measure, when this is rendered necessary by imperative military necessities.’

Common Article 8/8/8/9 defines the general mission of Protecting Powers under humanitarian law but does not regulate their appointment or their particular tasks, which are assigned to them by specific provisions of the Geneva Conventions. These two subjects will be considered in the following two sections.

3. The appointment of a Protecting Power

Article 8/8/8/9 common to the four Geneva Conventions of 1949 is peremptory. It begins:

The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.

It does not offer parties to a conflict a form of co-operation which they are free to refuse, but imposes on them an obligation they are bound to respect.\textsuperscript{16}

The Conventions do not, however, lay down a procedure for the appointment of Protecting Powers. The reason is that humanitarian law did not invent Protecting Powers, but had recourse to an institution already firmly established in diplomatic and consular practice. The customary rule that has emerged from that practice will therefore prevail.

Before a Protecting Power can take up its assigned tasks there will have to be two, or perhaps three, agreements between the states concerned.

\textit{i)} Agreement between the mandator state and the Protecting Power

No state can style itself a Protecting Power of its own accord. A Protecting Power must be given a mandate by the state requesting its services, which specifies the extent of the protection to be exercised. A Protecting Power has only delegated authority. Therefore, as a general rule it can claim only the rights belonging to the state it represents, in accordance with the principle \textit{nemo plus juris transferre potest quam ipse habet}. The state represented may not ask the Protecting Power to perform tasks that could obviously harm that Power.\textsuperscript{17}
The Protecting Power is required not to overstep the limits of the mandate entrusted to it. It must regularly account for its activities to the mandator state and report to it on the situation of its nationals in enemy territory.\(^\text{18}\)

A neutral state is under no legal obligation to accept the mandate it has been asked to perform, but diplomatic tradition and international courtesy require neutral states to grant such requests, subject to the consent of the host state – the one to which the diplomatic mission concerned is accredited. Switzerland, for example, did not feel entitled to refuse such a mandate.\(^\text{19}\)

Conversely, soon after the Second World War Switzerland unilaterally terminated its protection of German interests because the Reich government had ceased to exist.\(^\text{20}\) Similarly, Switzerland refused to assume the protection of some Japanese interests because it was no longer sufficiently free to communicate with the Japanese government, then under Allied tutelage.\(^\text{21}\)

These two examples clearly show that, at least in Swiss practice, no state can be a Protecting Power unless it has been so appointed by another state.

**ii) Agreement between the Protecting Power and the host state**

A state selected to act as a Protecting Power may not take up its assigned tasks without prior acceptance as such by the host state. It will usually seek to conclude a formal agreement with the host state guaranteeing that it will be allowed to perform satisfactorily the tasks it is being asked to accept.\(^\text{22}\)

The host state is free to refuse the services of the Protecting Power designated by the adverse party, but it may not act in such a way that the interests and nationals of another state are left unprotected. For example:

> ... the Indonesian decision of April 1961 asking the United Kingdom to cease representing Dutch interests in Indonesia was legitimate. But it was not legitimate to announce that Indonesia would no longer allow Dutch interests to be protected by another State. That decision is without precedent in diplomatic annals, and betrays a curious conception of international relations.\(^\text{23}\)

In an international armed conflict that attitude would manifestly be in breach of common Article 8/8/8/9.

**iii) Terms of reference**

For a Protecting Power to be appointed, belligerents must at least be able to agree as to what the state designated as Protecting Power will have to do. In humanitarian law, the reference basis is of course the Geneva Conventions.\(^\text{24}\)

On the other hand, no bilateral agreement or direct communication between parties to a conflict is necessary before Protecting Powers can be appointed or begin their work.

To sum up, paragraph 1 of common Article 8/8/8/9 imposes a twofold obligation:

a) the obligation for each party to a conflict to designate a Protecting Power to safeguard its nationals in the power of the adverse party;
b) the obligation not to raise unreasonable objections to prevent the Protecting Power designated by the adverse party from taking up its duties.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law made no changes in the already existing system, but after examining various proposals adopted two provisions, the main purpose of which is to clarify the twofold obligation stemming from the first sentence of Article 8/8/8/9 common to the Geneva Conventions. Those provisions are contained in Article 5, paragraphs 1 and 2, of Protocol I, which states:

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.
2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

4. The functions of Protecting Powers under the Geneva Conventions and Protocol I

As the duties and prerogatives of Protecting Powers under the Law of Geneva are clearly specified in the Conventions and Protocol I, they will not be examined in detail here. Their mandate can be summarized under two main headings, liaison and scrutiny.

Liaison

The Protecting Power is a channel for liaison between parties to a conflict; it must receive from the detaining power various kinds of information and documents which it will communicate to the power of origin, such as the laws and regulations concerning the application of the Conventions, lists of prisoners of war and civilian internees, notification of judicial proceedings instituted against protected persons, and the judgments pronounced, etc. Conversely, the power of origin may request the Protecting Power to forward various communications relating, for example, to recognition of the aid societies allowed to perform the duties mentioned in the First Convention, and notification of the commissioning of hospital ships. It may require the Protecting Power to pass on its protests and complaints to the adverse party, and can ask it to forward and distribute relief supplies, allowances, etc. The Protecting Power may also be asked to lend its good offices
either to smooth out differences of opinion on the interpretation and application of the Geneva Conventions, or to facilitate negotiations on matters requiring agreement between the belligerents, such as repatriating seriously sick and seriously wounded prisoners of war before the end of hostilities, internment in a neutral country, and establishing hospital and safety zones and localities.

**Scrutiny**

The Protecting Power is mandated to co-operate in implementing the Geneva Conventions, and to monitor their application; for this purpose its representatives must be permitted to go to all places where prisoners of war or civilians protected by the Fourth Convention may be, particularly places of internment, imprisonment and labour, and to speak with the protected persons in private; they are also entitled to receive requests and complaints from protected persons, in particular prisoners’ representatives and members of Internee Committees; when judicial proceedings are brought against protected persons, the Protecting Power has the right and the duty to find them an advocate or counsel; its representatives will normally be authorized to attend the trial; when a party to a conflict allows the passage of relief supplies for the civilian population of a territory under the authority of the adverse party, it may demand that their distribution be supervised by representatives of the Protecting Power; the Protecting Power must be freely able to verify the state of the food and medical supplies in occupied territories; it will supervise any evacuations of children who are not nationals of the party to the conflict carrying out the evacuation, etc.

Thus the Geneva Conventions and Protocol I entrust the Protecting Powers with far-reaching prerogatives commensurate with their functions. And with good reason; for it was painfully obvious in both world wars that treaty provisions for the protection of war victims were ignored where there was no proper supervision, and proper supervision is primarily the task of Protecting Powers.

**Notes**

1 According to Article 3 of the Vienna Convention on Diplomatic Relations of 18 April 1961: ‘The functions of a diplomatic mission consist *inter alia* in: ... b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.’
Ibid., pp. 88–104 and 243–56.


For the legislative history of Article 86 of the Convention of 27 July 1929, see: Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre, réunie à Genève du 1er au 27 juillet 1929, Imprimerie du Journal de Genève, Geneva, 1930 (hereinafter Actes 1929), pp. 512–20, 544–52 and 636–7; Procès-verbaux de la Sous-Commission I (juridique et pénale) et de la Sous-Commission II (administrative et sanitaire) de la Conférence diplomatique de 1929, cyclostyled (ICRC Library, ref. no. 341.33/4D), First Sub-Commission (juridical and penal) of Commission II, meetings of 12, 13 and 15 July 1929. The English translation is taken from the League of Nations Treaty Series, vol. 118, p. 393; however, it does not accurately reflect the French original which says: ‘Les Hautes Parties contractantes reconnaissent que l’application régulière de la présente Convention trouvera une garantie dans la possibilité de collaboration des Puissances protectrices chargées de sauvegarder les intérêts des belligérants…’ The text obviously refers to the collaboration which the Protecting Powers may offer to belligerent states in order to facilitate the implementation of the Convention, and not to collaboration between the Protecting Powers.

7 Franklin, Protection of Foreign Interests, pp. 261–77; Antonino Janner, La Puissance protectrice en droit international, D’après les expériences faites par la Suisse pendant la seconde guerre mondiale, Verlag von Helbing und Lichtenhahn, Basel, 1948, pp. 68–70.

8 Janner, La Puissance protectrice en droit international, p. 17.

9 Ibid., p. 22.


11 Strictly speaking, the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict should also be included, for the procedure for its application closely follows that of the Geneva Conventions.

12 Article 45 of the Vienna Convention on Diplomatic Relations of 18 April 1961 stipulates that: ‘If diplomatic relations are broken off between two states or if a mission is recalled either definitively or temporarily:

a) the receiving State shall, even in case of armed conflict, respect and protect the premises of the mission and its property and archives;

b) the sending State may entrust the custody of the premises of the mission, together with the property therein and its archives, to a third State acceptable to the receiving State.

c) the sending State may entrust the protection of its interests and of those of its nationals to a third State acceptable to the receiving State’. Article 27 of the Vienna Convention of 24 April 1963 establishes similar rules to be applied if consular relations are broken off.

13 Emphasis added. The Vienna Convention on Consular Relations of 24 April 1963 similarly states in its Article 27 that should consular relations between two states be broken off, ‘the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State’ (emphasis added).

14 All the tasks which the Geneva Conventions entrust to Protecting Powers also come under diplomatic law by virtue of Article 45 of the Vienna Convention on Diplomatic Relations, and because provision is made for entrusting their execution to the diplomatic agents of those Powers. The reverse is not true, for some of the tasks which diplomatic law entrusts to Protecting Powers, for example custody of the premises, archives and property of diplomatic and consular missions, have nothing to do with humanitarian law. Clearly, therefore, the ‘Vienna mandate’ extends beyond the ‘Geneva mandate’. Nevertheless, in the event of war...
The Protecting Power’s officials will be engaged mainly in the tasks common to the ‘Geneva mandate’ and the ‘Vienna mandate’.


The French text is equally clear. It reads: ‘La présente Convention sera appliquée avec le concours et sous le contrôle des Puissances protectrices …’ (emphasis added). The Geneva Conventions leave each party to a conflict free to choose the neutral state to which it would like to entrust the protection of its interests and those of its nationals, a choice which obviously cannot be determined by the Conventions themselves. Certain commentators have hence argued that the appointment of a Protecting Power is optional, but this is belied both by the provisions of the Conventions and by the preparatory work. In fact, the appointment of a Protecting Power could be compared with choosing a third-party liability insurance for a car in most countries with a free-market system: whereas the vehicle owner is free to choose the insurance company he pleases, he is obliged to take out third-party insurance before being able to use his motor vehicle. Just as no one would argue that third-party liability insurance is optional, there is no reason to conclude that the appointment of a Protecting Power is optional either. Common Article 8/8/8/9 imposes a binding obligation on the parties, and it follows from that obligation that the Protecting Powers system itself is obligatory.


Ibid., p. 11.

Ibid., pp. 29–30.

Ibid., p. 12.


Chapter IV below on the role of the ICRC as a possible substitute for Protecting Powers contains a more detailed account of their tasks (see below, pp. 878–82). A table comparing the tasks of the Protecting Powers with those of the ICRC will be found below in Appendix II, pp. 1044–68.

Common Article 48/49/128/145.

Third Convention, Article 122; Fourth Convention, Article 137.

Third Convention, Article 104; Fourth Convention, Article 71.

First Convention, Article 26.

Second Convention, Articles 22, 24 and 25.

The Conventions do not explicitly assign this duty to the Protecting Power, but it is unquestionably an attribute of Protecting Powers by the latter’s very nature and by virtue of state practice.

Third Convention, Article 73, paragraph 3, and Article 75; Fourth Convention, Article 109, paragraph 3, and Article 111.

Fourth Convention, Article 39.


Third Convention, Article 109.

First Convention, Article 23; Fourth Convention, Article 14.


Third Convention, Article 126; Fourth Convention, Article 143.

Third Convention, Article 78; Fourth Convention, Article 101.

Third Convention, Article 105, paragraph 2; Fourth Convention, Article 72, paragraph 2.

Third Convention, Article 105, paragraph 5; Fourth Convention, Article 74.

Fourth Convention, Articles 23 and 59.
However, neither Article 3 of the Geneva Conventions nor Protocol II assign any rights or duties to Protecting Powers; thus no provision is made for their intervention in a non-international armed conflict.

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CHAPTER II

THE TASKS OF PROTECTING POWERS AND OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

However carefully one reads the Geneva Conventions, a guiding principle to explain the division of responsibilities between the Protecting Power and the International Committee will be sought in vain. Their respective duties largely overlap and the Conventions often mention them together.

Admittedly, the transmission of laws and regulations relating to implementation of the Geneva Conventions,¹ and legal assistance to prisoners of war and civilian internees against whom penal proceedings are being taken,² are tasks specifically assigned to the Protecting Powers. However, there is nothing to prevent the ICRC, by virtue of its recognized right of humanitarian initiative, from offering to perform these functions. Conversely, whilst the International Committee’s special position as regards relief operations for prisoners of war and civilians protected by the Fourth Convention must always be recognized and respected,³ the Protecting Power is free to take part in such operations because common Article 8/8/8/9 requires it to give its general co-operation in applying the Geneva Conventions.

In addition, many provisions in the Conventions grant the Protecting Powers and the International Committee exactly the same duties and prerogatives, for example, those of forwarding information on the identity of prisoners of war and civilian internees,⁴ and visiting places of internment.⁵

This is not fortuitous. It follows from the very nature of the fact that Protecting Powers and the International Committee have different terms of reference but their ultimate purpose is the same – to protect war victims, especially combatants and civilians who have fallen into enemy hands. Clearly, they work on similar lines and have to cope with the same problems. Naturally enough their activities show a certain affinity, especially as in both world wars the Protecting Powers and the ICRC tried to harmonize their working methods and approaches. When endorsed by codification, their respective practices had too much in common for their similarity not to be reflected in the Conventions.

But what happens if a party to a conflict considers that the parallel activities of the ICRC and the Protecting Power appointed by the adverse party impose an undue burden upon it and are unjustifiable? Can it refuse the ICRC the facilities granted to it by the Geneva Conventions, claiming that as
the enemy nationals in its hands already have the benefit of a Protecting Power there is a duplication of activities?

This question can be answered by delimiting the areas of activity – essentially the transmission of information the detaining power is required to give, and visits to places of internment – in which the responsibilities of the Protecting Power and the International Committee overlap.

The Conventions require the detaining power to communicate all the information needed to identify prisoners of war and civilian internees to their power of origin via the Protecting Power and the Central Tracing Agency.\(^6\)

Not so with the ICRC. The Central Tracing Agency processes the lists it receives and creates its own files. These, being kept in a neutral country, are safe from air raids and other hazards of war, unlike those of the belligerent states’ national information bureaux.\(^7\) Also, the Agency is authorized to use all available sources of information, public or private, belligerent or neutral. In both world wars it traced thousands of missing persons from information given by district authorities, local Red Cross sections, parishes and private individuals. Conversely, the families of missing persons send it thousands of applications which it can answer direct from its capture cards and the lists passed it, so easing the strain on the national information bureaux. And in most cases families received information more quickly through the Red Cross than through diplomatic channels.\(^8\)

It would therefore not be correct to say that the Central Agency duplicates the work of the belligerents’ national information bureaux or that by passing on information it duplicates the work of the Protecting Powers. Anyway, in this age of photocopiers, E-mail and computers the detaining power’s extra workload through having to pass on information to two offices can hardly be called unbearable.

With regard to visits to places of internment, Article 126 of the Third Convention and Article 143 of the Fourth Convention grant exactly the same prerogatives to ICRC delegates as to the representatives of the Protecting Powers.

However, the two parties’ activities cannot be said to overlap, for the representatives of the Protecting Power are acting at the request of the state whose interests they protect; their responsibilities are limited to the nationals of that state; and as a general rule their reports after visiting places of internment are sent only to the power of origin of the prisoners they visit.

In contrast, the International Committee derives its mandate from all the states party to the Geneva Conventions. Its delegates normally visit all persons held in a place of detention, whatever the prisoners’ nationality. As a general rule ICRC delegates do this work in all belligerent countries. It is
consequently possible to compare conditions of detention and put forward the argument of mutual interest to good effect. Reports by ICRC delegates on their visits to places of detention are delivered simultaneously and in identical form to the detaining power and the power of origin of the prisoners visited. Furthermore, those visits enable the ICRC to monitor conditions of detention, to use firsthand information to obtain better living conditions for detainees, to orient its relief operations and to supervise distributions of its relief supplies.  

Here, too, it is plain that the activities of Protecting Powers and the ICRC complement but do not duplicate each other.  

It is therefore firmly established that a detaining power may not, on the grounds that it grants a Protecting Power facilities to safeguard the interests of the adverse party, restrict the freedom of action that the Geneva Conventions confer upon the International Committee. The 1949 Conventions are perfectly explicit on this point and state practice confirms it, for in two world wars the work of the Protecting Powers and the ICRC was conducted in parallel, without detriment to the activities of either. All this goes to show that the ICRC is not a mere stand-in for humanitarian affairs which will have nothing to do whenever a Protecting Power has been appointed.  

After all, even though their legal basis is the same, the aims of Protecting Powers and of the ICRC are different but complementary.  

A Protecting Power is always the representative of a state. It is concerned with the nationals of that state. Its representations to the detaining power are made on behalf of that state, and more often than not at its injunction. Unless there is a flagrant breach of the Conventions, especially one violating its own rights and prerogatives, the Protecting Power will hesitate to make any such representations on its own initiative.  

The International Committee, on the other hand, is the guardian of the Fundamental Principles of the Red Cross and Red Crescent. It is not the representative of any particular government. It acts independently and is under no legal obligation to account for its activities. It endeavours to reach all victims of conflicts. It intervenes on its own initiative when it sees that the humanitarian principles it is mandated to uphold are being violated. It is under no obligation to pass on the protests and requests of the power of origin, and will act on those requests only if it can expect the persons it protects to benefit thereby.  

Thus the dual system of scrutiny meets two different requirements. The first form of scrutiny, which is more official, is essentially based on a delegation of authority by a state to a Protecting Power. The second, less formalized, is based on duties and prerogatives assigned to the ICRC by the entire international community and allows much greater scope. The two forms of scrutiny complement each other.
Notes

1 Common Article 48/49/128/145.
2 Third Convention, Article 105; Fourth Convention, Articles 72 and 74.
3 Third Convention, Article 125; Fourth Convention, Article 142.
4 Third Convention, Article 122; Fourth Convention, Article 137.
5 Third Convention, Article 126; Fourth Convention, Article 143.
6 Third Convention, Article 122; Fourth Convention, Article 137.
7 The risk that the records of national information bureaux may be destroyed should not be underestimated. In the Second World War much of the documentation of the British national information bureau and most of that of the German national information bureau were destroyed in air raids, and the governments of both countries therefore had often to apply to the Central Agency for Prisoners of War for information that only it possessed (Annual Report 1952, p. 44; Annual Report 1955, p. 27; Annual Report 1960, pp. 28–9).
8 Procès-verbaux de la Sous-Commission I (juridique et pénale), et de la Sous-Commission II (administrative et sanitaire), de la Commission II de la Conférence diplomatique de 1929, cyclostyled (ICRC Library, reference 341.33/4D), session of 13 July 1929, p. 3 (statement by Mrs Frick-Cramer).
10 It would be easy, but would take up too much space, to give further evidence of this by citing all the tasks which the Geneva Conventions assign to Protecting Powers and the ICRC. They would point to the same conclusion.
11 Conversely, a detaining power may not, on the grounds that it has granted facilities to the ICRC, restrict the freedom of action of the Protecting Power appointed by the adverse party. That would be a flagrant breach of the Geneva Conventions and of Article 45 (c) of the Vienna Convention of 18 April 1961 on diplomatic relations.
13 This interpretation confuses the activities which the Geneva Conventions assign to the ICRC in its own right with the additional tasks it might be called upon to perform if accepted, in accordance with common article 10/10/10/11, as a substitute in the absence of a Protecting Power. It contradicts the letter and spirit of the Geneva Conventions, and betrays complete ignorance of the ICRC’s history and of the preparatory work for the 1929 and 1949 Conventions.

References

CHAPTER III

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE APPOINTMENT OF PROTECTING POWERS

Under the 1949 Conventions, each party to a conflict must designate a Protecting Power to safeguard its nationals in the hands of the adverse party, and must give the Protecting Power designated by the adverse party the facilities it needs to discharge its mandate.¹

The Conventions contain no rules for the appointment of Protecting Powers. The customary rules will therefore apply. In practice the current procedure is simplicity itself. It is as follows:

The belligerent Power which wishes its interests to be protected asks a neutral Power if it is willing to represent it. Should the neutral Power agree, it asks the enemy Power for authorization to carry out its duties. If the enemy Power gives its consent, the neutral Power then starts its work as a Protecting Power.²

Thus the Geneva Conventions, whilst requiring parties to a conflict to designate a Protecting Power to safeguard their nationals in the hands of the adverse party, leave each party to take the initiative in this respect. Appointment being compulsory, one might have thought that parties to a conflict would make every effort to give their nationals the best possible protection, and that the prescribed procedure would always work. Not so; since the 1949 Conventions were adopted there appear to have been only five conflicts in which Protecting Powers have been appointed:³

- the Suez conflict between Egypt and its adversaries Great Britain and France (1956);⁴
- the conflict between France and Tunisia over Bizerta (July 1961);⁵
- the Goa crisis between India and Portugal (1961);⁶
- the Indo-Pakistan conflict (December 1971);⁷
- the South Atlantic conflict between the United Kingdom and Argentina.⁸

No Protecting Power has been appointed in any other conflict since 1949. Consequently millions of war victims have been deprived of the assistance of a neutral state, and of that minimum of third-party supervision of their living conditions without which the protection of the Conventions may often prove illusory. In the long run that omission threatens the whole treaty system of protection, for rules lose their binding force if, time and time again, the mechanisms for applying them are rendered inactive.

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It is therefore not surprising that a new procedure for the appointment of Protecting Powers was proposed in discussions on the reaffirmation and development of humanitarian law. Since the belligerents themselves did not spontaneously request a third state to protect their nationals in enemy hands, should not an impartial intermediary be allowed to lend its good offices to facilitate the designation of Protecting Powers? If so, was not the International Committee the intermediary best qualified to do so? The replies were obvious. The ICRC having declared that it was willing to perform the tasks that the Conference had in mind for it, the proposal was adopted without difficulty.

The result was Article 5, paragraph 3, of Protocol I:

If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, inter alia, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

It would be a mistake to see this proposal only as confirming a competence that the ICRC already had by virtue of its right of humanitarian initiative, for Article 5, paragraph 3, of Protocol I makes two significant points clear:

a) Since the competence of the ICRC is explicitly recognized in treaty law, no state will be able to accuse it of intervening in a matter outside its province, especially as in every situation to which Protocol I applies the ICRC has not only the right but also the duty to offer its good offices for the designation of Protecting Powers.

b) The belligerent states are obliged to help put this procedure into effect and to provide the lists requested by the International Committee.

Even so, the significance of this provision should not be overestimated. In spite of the claims of all too many delegates at the Diplomatic Conference, the lack of Protecting Powers in most conflicts since 1949 was not due to any inadequacy of the procedure for appointing them. The reasons for which belligerents evaded their obligation of asking a third state to protect their nationals in enemy hands were political. Foremost among them were:

- the fear that the appointment of a Protecting Power might be interpreted as implicitly recognizing an enemy whose existence as a legal entity was contested;
• denial that the Geneva Conventions were applicable to the particular case;
• denial that any armed conflict existed, or of any involvement in an armed conflict;
• fictitious legal classifications: in spite of massive foreign intervention, the conflict was represented as a non-international one so that no Protecting Power could be appointed.

As these examples make plain, political factors have all too often blocked the appointment of Protecting Powers. State practice alone will show whether the provisions of Article 5, paragraph 3, of Additional Protocol I will henceforth enable such difficulties to be overcome.

Notes

3 Even in these five cases the Protecting Powers could not always perform all the tasks prescribed by the Conventions, nor act for all the belligerents.
4 Switzerland represented British and French interests in Egypt, whereas India represented Egyptian interests in the United Kingdom and France, Keesing’s Contemporary Archives, 1956, p. 15181. No Protecting Power represented Egyptian interests in Israel or Israeli interests in Egypt.
5 Sweden protected Tunisian interests in France, whereas Switzerland protected French interests in Tunisia, Keesing’s Contemporary Archives, 1961, p. 18343 A.
6 Egypt protected Indian interests in Portugal, whereas Brazil continued to protect Portuguese interests in India, as it had done since the rupture of diplomatic relations in 1955, Keesing’s Contemporary Archives, 1961, p. 18635 B.
7 Both states appointed Switzerland as Protecting Power, Keesing’s Contemporary Archives, 1972, p. 25054 A. But Switzerland was merely requested to lend its good offices between Pakistan and Bangladesh.
8 Switzerland represented British interests in Argentina whereas Brazil represented Argentine interests in the United Kingdom; their representation was of a traditional diplomatic nature, since neither Switzerland nor Brazil had been formally appointed as Protecting Powers within the meaning of the Geneva Conventions. Nevertheless, by performing some of the tasks assigned to Protecting Powers by the Conventions, in particular notification to the belligerents of vessels commissioned by the adversary for use as hospital ships, both these states helped to implement them. Sylvie-Stoyanka Junod, Protection of the Victims of Armed Conflict Falkland/Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action, ICRC, Geneva, 1984, p. 20.
11 For the legislative history of Article 5 of Protocol I, see the documents cited above in note 25 to Chapter I of this Part, pp. 856–7.
References

CHAPTER IV

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AS A SUBSTITUTE FOR PROTECTING POWERS

1. Introduction

The Second World War gave striking proof of the value of Protecting Powers in supervising the application of humanitarian rules, as evidenced by the treatment of prisoners of war and civilian internees who benefited from the help of a Protecting Power, on the one hand, and that of the millions of prisoners of war and civilian captives left at the mercy of their captors on the other. Small wonder, then, that the 1949 Conference agreed practically without discussion to extend the competence of Protecting Powers to supervising the application of the four Conventions, and to make scrutiny by them compulsory. Both these aims were achieved by the adoption of common Article 8/8/8/9 discussed above.

But the Second World War also showed that even where the 1929 Convention was applicable, captives could be deprived of the aid of a Protecting Power. Thus, the Protocol of 16 November 1940 between the Reich government and the Vichy authorities substituted the Scapini Mission’s supposed national scrutiny, which proved totally ineffective,¹ for supervision by the Protecting Power for French prisoners of war in Germany. And in December 1941 the Third Reich opposed Switzerland’s acceptance of several protection mandates formerly held by the United States, on the grounds that Germany no longer recognized as belligerent states countries (such as Norway, the Netherlands and Belgium) whose government had left the national territory.²

It is therefore understandable that for cases in which protected persons do not benefit, or cease to benefit, by the activities of a Protecting Power the Diplomatic Conference should have laid down a procedure for the appointment of a substitute. There were precedents for this which will now be considered.

2. The origins³

Two particularly significant precedents should be mentioned. They are:

- the mission to protect Russian prisoners of war in Germany after the First World War;
The ICRC's activities during the Second World War to protect members of the Free French Forces in captivity in Germany and German prisoners held by the Free French Forces.

It would certainly be a mistake to view the work of the International Committee during the First World War merely as that of a substitute for Protecting Powers, for most of the prisoners of war helped by the ICRC, such as British and French prisoners in Germany, German prisoners in France and the United Kingdom, Italian prisoners in Austria, Russian prisoners in Germany, and German prisoners in Russia, did also benefit by a Protecting Power's activities. But even then the International Committee did all it could to ease the effects on prisoners of war of such a Power's absence or inability to act. Thus in spring 1918, the ICRC sent a mission to visit camps for Allied prisoners of war in Bulgaria because the prisoners' Protecting Power had not been permitted to do so.4

In that respect the ICRC mission from 1920 to 1921 to protect Russian prisoners of war in Germany is undoubtedly the most remarkable. In January 1919 the victorious powers imposed an Inter-Allied Commission on Germany to control the situation of Russian prisoners of war.5 As it was suspected that most of these prisoners supported the Bolsheviks and were likely, if repatriated, to swell the ranks of the Red Army, the Inter-Allied Commission forbade repatriations to Soviet Russia. The Commission was dissolved in February 1920, shortly after the Treaty of Versailles came into force;6 Germany regained its freedom of action but was left with an extremely volatile situation on its hands. Disheartened by captivity and seeing no prospect of its ending, disgusted by broken promises and convinced that the Allies would prevent their return home, the Russian prisoners were on the brink of revolt. They were tormented by having no news of their families, by their country's uncertain future and by political pressure. Meanwhile tens of thousands of German, Austrian and Hungarian prisoners of war were trapped in Russia, the Soviet government refusing to repatriate them until Germany allowed the Russian prisoners to return. The German government therefore endeavoured to appoint a neutral body to assist in supervising the prisoner-of-war camps and negotiating exchanges of German and Russian prisoners of war, a body that could guarantee that Russian prisoners would all be repatriated of their own free will, and with whose help any disputes between Russian prisoners of war and the camp authorities could be settled.7 In short, it requested a good offices mission between the detaining power, the power of origin and the states of transit, to be combined with a mandate to inspect prisoner-of-war camps and a form of mediation between the captives and the detaining authority.

These tasks were obviously part of the responsibilities of a Protecting Power, but no state at that time had diplomatic relations with the Soviet regime. Besides, the German government was anxious to take the question of repatriating prisoners of war out of the political arena in which the
Inter-Allied Commission had placed it, and to deal with it in the only way it
could ever be settled, namely by adopting a humanitarian approach. The
German government therefore requested the services of the International
Committee which, after obtaining the necessary assurances, sent to Germany
a delegation which soon numbered about twenty delegates and interpreters
staffing seven regional offices. This extensive deployment made it possible to
carry out regular and virtually permanent inspections of the main prisoner-
of-war camps. Repatriation began in May 1920 and went on until July 1921,
after which the ICRC mission was phased out.

The term ‘substitute for a Protecting Power’ does not appear in the docu-
ments of the time, but there can be little doubt that, circumstances having
prevented the appointment of such a Power, the ICRC acted as the de facto
Protecting Power of Russian prisoners of war in Germany.

In the Second World War, too, many prisoners of war were deprived of the
help of a Protecting Power even where the 1929 Convention was applicable.

Those needing legal assistance were the worst affected, for under Articles
60ff of the 1929 Convention it was the responsibility of the Protecting Power
to see to it that prisoners of war prosecuted by the detaining power enjoyed
the legal safeguards to which they were entitled. The Protecting Power was
granted extensive prerogatives for that purpose:

- It had to be notified of judicial proceedings against prisoners of war
  (Article 60).
- If the accused had not chosen an advocate the Protecting Power was enti-
tled to procure one for him (Article 62, paragraph 1).
- Its representatives were entitled to be present at the hearing unless there
  were imperative security reasons for excluding them (Article 62, para-
  graphs 3 and 4).
- Sentences on prisoners of war had to be communicated immediately to the
  Protecting Power (Article 65).
- A death sentence on a prisoner of war could not be carried out for at least
  three months after the date on which the Protecting Power received com-
  munication of the sentence (Article 66).
- Prisoners retained the right, after being sentenced, to communicate with
  the Protecting Power (Article 67).

The Convention did not recognize the International Committee as competent
to act in such matters, but whenever prisoners of war received no help from a
Protecting Power the ICRC did its best to make up for this deficiency. It
organized legal assistance, for instance, for Yugoslav, Greek, Polish, Belgian
and other prisoners of war held by the Axis powers, and for German and
Italian prisoners of war being tried by Allied courts. Unfortunately its
efforts were far from uniformly successful.

The question whether the ICRC should take over the functions normally
assigned to Protecting Powers arose most particularly in respect of relations
between the Third Reich and General de Gaulle’s Free French Forces. In the eyes of the Reich government, neither the French Committee of National Liberation in Algiers, nor the Provisional Government of the French Republic which succeeded it once Paris was liberated, had any legal existence, and only the Vichy regime was qualified to represent French interests.  

As with all legal fictions it was not long before this claim recoiled upon its makers. When the Axis forces in North Africa surrendered in May 1943 the Free French Forces took thousands of prisoners who did not benefit by the activities of a Protecting Power. The authorities in Algiers proposed that Spain, which until the armistice of June 1940 had been charged with the representation of German and Italian interests in France and the French Empire, should act as Protecting Power for these prisoners, on condition that Germany and Italy agreed to the appointment of a Protecting Power to look after French prisoners. The German government rejected the proposal and the Italian government did not answer it. The French authorities in Algiers nevertheless continued to send the Spanish consuls notifications and documents concerning prosecutions of German and Italian prisoners and the sentences passed.  

In November 1943 the German government asked the International Committee to take charge of judicial assistance to German prisoners of war held by the French forces in North Africa. This was the first time the ICRC had received such a request. On humanitarian grounds, ‘and in view of the fact that these prisoners had no Protecting Power’, it gave its consent, whilst stressing ‘that it could not assume any official mandate and remained sole judge of its own actions’.  

Having obtained from the authorities in Algiers the facilities necessary for this mission, the ICRC applied to Berlin for similar facilities so that it could give equivalent judicial assistance to French prisoners on trial in German courts. Negotiations continued until May 1945, but no agreement was reached enabling the ICRC to give legal aid to the prisoners of war concerned on both sides.  

The ICRC nevertheless performed many of the tasks usually assigned to Protecting Powers. For example, in November 1944 the Provisional Government of the French Republic requested the ICRC to notify the Reich government and the authorities of the ‘Italian Social Republic’ of the commissioning of the hospital ship Canada. The French Ministry of Foreign Affairs pointed out that since the International Committee was acting in France as the protector of German interests, it was only natural that in return the German government should welcome any similar action for the protection of French interests, especially action based on a formal provision of a Convention regulating relations between belligerents. The ICRC likewise exploited this opportunity of obtaining some legal guarantees for French prisoners of war in Germany, and with the support of the French authorities gave substantial judicial assistance to German prisoners of war on trial in French courts. In February 1944 the Spanish Consul in Algiers informed the
ICRC delegation there that he would in future hand over to it all original documents transmitted by the French authorities, the German government having notified the Spanish government ‘that it had commissioned the ICRC to take the place of the Protecting Power’. From then on the French authorities sent notifications of judicial proceedings and sentences direct to the ICRC delegation, using the opening phrase: ‘In the absence of a Protecting Power for German (or Italian) interests and in accordance with Article 60 of the Convention …’.20

The German capitulation greatly increased the ICRC’s work as a substitute for Protecting Powers, as large numbers of German prisoners of war were on trial by Allied courts for war crimes or other offences and Switzerland had ceased to act as Protecting Power when there was no longer a German government. Consequently the ICRC set up a legal assistance section which continued to work for several years after the end of hostilities.22

Thus without any formal agreement the ICRC in fact exercised most of the humanitarian functions of Protecting Powers in relations between the Free French authorities and the Third Reich. It was therefore not surprising that during the proceedings for the revision of the humanitarian Conventions provision was made for the ICRC to act as a substitute in case no Protecting Power had been appointed. Those proceedings will now be considered.

3. The legal bases23

Nearly 70 per cent of the prisoners of war in the Second World War were deprived of the help of a Protecting Power for all or part of their captivity.24 No wonder, therefore, that the post-war proposals for the revision of the humanitarian Conventions included a procedure for replacing a Protecting Power should its appointment run into insurmountable difficulties.25 The Geneva Conference of Government Experts in 1947 took the first step in that direction by recommending that, should no Protecting Power be appointed, the ICRC or another impartial humanitarian body could agree to pass on the notifications and information which the Conventions require the belligerents to exchange.26

Emboldened by this encouragement, the ICRC inserted a common article introducing a real substitution procedure into the four draft Conventions submitted to the Seventeenth International Conference of the Red Cross, held in Stockholm in August 1948. It proposed that in default of a Protecting Power, the latter be replaced either by a body which offers all guarantees of impartiality and efficacy and is acceptable to the parties to the conflict, or by a neutral state or a humanitarian organization such as the ICRC, appointed unilaterally by the detaining power if the parties failed to agree among themselves.27 The Stockholm Conference adopted this proposal without substantial change28 and it was then submitted to the Diplomatic Conference of 1949.29
The discussions of the Diplomatic Conference were long and rather confused. No one disputed the need for a substitution procedure should the appointment of Protecting Powers prove impossible, but the delegates had an incredible variety of ideas about the bodies that might be asked to act as substitutes, how they should be appointed and how far their terms of reference should extend. Moreover, the term ‘substitute for a Protecting Power’ was applied to institutions that had nothing in common with each other, irrespective of the extent of the duties they were to be asked to perform. In effect, some delegations wanted the International Committee to take over the humanitarian tasks normally assigned to Protecting Powers, whereas others proposed setting up an ad hoc international body to assume all the duties of Protecting Powers, including those essentially within the domain of diplomatic law. Common Article 10/10/10/11 betrays the uncertainty and vacillation of the discussions. It reads:

The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention. When [protected persons] do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict. If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention. Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially. No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied. Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

Interpretation of common Article 10/10/10/11 raises many difficulties, two of which are relevant to our subject:

- What possibility is there of appointing the ICRC as a substitute for Protecting Powers?
- What would be the extent of the ICRC’s mandate as a substitute for Protecting Powers?
These points will be dealt with in the next two sections.

4. Appointment of the ICRC as a substitute for Protecting Powers

In what conditions may the ICRC be requested to act as a substitute for Protecting Powers? Common Article 10/10/10/11 has provided for three possibilities:

a) replacement of Protecting Powers by an organization which offers all guarantees of impartiality and efficacy, appointed by agreement between the parties (paragraph 1);

b) if no such agreement can be reached, replacement of Protecting Powers by a neutral State or by an organization which offers all guarantees of impartiality and efficacy, appointed unilaterally by the detaining power (paragraph 2);

c) if protection cannot be arranged accordingly, replacement of Protecting Powers by a humanitarian organization such as the ICRC, appointed by the detaining power, or acceptance by the detaining power of offers of services from any such organization (paragraph 3).

It is clear from the letter and the spirit of common Article 10/10/10/11 that these possibilities have to be considered in the above order: when the first is exhausted by default the second applies, and when the second is exhausted the third applies.34

The Diplomatic Conference of 1949 saw the International Committee as coming ‘at the bottom of the list’ of possible substitutes.35 However, the first possibility related mainly to a French proposal to form a permanent international organization in peacetime that in a world war would take over the duties assigned to Protecting Powers.36 That organization never materialized.37

The second possibility, replacement of a Protecting Power, in default thereof, by a neutral state or by an organization offering all guarantees of impartiality and efficacy appointed unilaterally by the detaining power, was the subject of a reservation by the Soviet Union and its allies. These states feared that the detaining power would appoint a neutral state or organization that was devoted to its cause and would give victims no real protection.38

There are therefore serious obstacles in the way of the first two substitution procedures mentioned in paragraphs 1 and 2 of common Article 10/10/10/11.

The third solution – entrusting to a humanitarian organization such as the ICRC the humanitarian functions normally assigned to Protecting Powers – is therefore the one to be explored. Moreover, since the present study is concerned with ICRC activities in aid of war victims, it will concentrate on the replacement of Protecting Powers, in default thereof, by the International Committee.
There are two eventualities:

a) The detaining power can ask the ICRC to assume the humanitarian functions normally performed by Protecting Powers.

b) The ICRC can offer its services to assume those functions.\(^{39}\)

If no Protecting Power has been designated, and once the other substitution procedures have been eliminated by default, the detaining power is under the obligation to ask an impartial humanitarian organization such as the ICRC to assume the humanitarian functions normally performed by Protecting Powers. Paragraph 3 of common Article 10/10/10/11 leaves no doubt as to the nature of that obligation.\(^{40}\) However, none of the powers involved in armed conflicts since 1949 appears to have made any such request to the ICRC or any other humanitarian organization, and no state is likely to submit unilaterally and of its own free will to outside supervision, even by a humanitarian institution. Should a state do so, that initiative would be subject to the reservation made by the Soviet Union and its allies, as in the case of unilateral appointment of a substitute under paragraph 2 of Article 10/10/10/11.

The second eventuality is therefore the one to be considered, namely that the ICRC can offer its services to assume the humanitarian functions normally performed by Protecting Powers. This is undoubtedly an instance of the ICRC’s right of humanitarian initiative, a right recognized by customary law and confirmed by the Geneva Conventions; but paragraph 3 of Article 10/10/10/11 provides two additional clarifications.

The first is that it mentions the International Committee by name. Therefore, no state party to the Geneva Conventions can dispute that the ICRC is qualified to assume the humanitarian functions normally incumbent on Protecting Powers, for the Conventions specifically recognize that it is so qualified.

The second is that under paragraph 3 of common Article 10/10/10/11 the detaining power is obligated to accept any offer of services that the International Committee may make to it with a view to assuming those functions. The peremptory terms of the article make this perfectly clear.\(^{41}\) The obligation is moreover confirmed by the Joint Committee’s report to the Plenary Assembly of the Diplomatic Conference,\(^{42}\) and indeed the government delegates understood it as such.\(^{43}\) It also follows inevitably from the firm resolve of the Diplomatic Conference to establish a protection mechanism that would apply in all circumstances, and from the ICRC’s position ‘at the bottom of the list’ of possible substitutes. When all other means of protecting war victims are exhausted, the belligerents are bound to accept the offers of services which the ICRC is entitled to make to them with a view to assuming the humanitarian functions normally performed by Protecting Powers.

Paragraph 3 of common Article 10/10/10/11 therefore gives the International Committee considerable scope. It makes the ICRC the ultimate
substitute and obliges the parties to the conflict to accept its offers of services to that effect.

Despite this conclusion, drawn from the Conventions and the preparatory work for common Article 10/10/10/11, there should be no misunderstanding as to the ICRC’s own attitude. Although the Geneva Conventions oblige parties to a conflict to accept offers of services by an organization such as the ICRC to perform the humanitarian tasks normally assigned to Protecting Powers, the ICRC itself has always considered that it could never offer to act as a substitute unless it were sure of being accepted in that capacity by the parties to the conflict concerned.44

This attitude harks back to the old practice of appointing Protecting Powers by agreement. It makes the appointment of the ICRC as a substitute for Protecting Powers subject to the belligerents’ consent, which is precisely what paragraph 3 of common Article 10/10/10/11 was meant to avoid. The International Committee’s policy may well be realistic and sensible, for a humanitarian organization such as the ICRC could hardly act as a substitute for Protecting Powers without the warring parties’ consent, but it certainly lags behind the provisions of the Conventions.

Paragraph 3 of common Article 10/10/10/11 is nevertheless of paramount importance for the ICRC, for if it is accepted as a substitute in default of Protecting Powers it will be assigned wider duties and powers because of paragraph 3 than those it has ipso jure under the rest of the Geneva Conventions.

In analysing the International Committee’s functions it would, however, be a great mistake to view them solely as those of a substitute for Protecting Powers. The ICRC holds a mandate in its own right, for which the Geneva Conventions have endowed it with clearly defined powers and responsibilities whether or not Protecting Powers have been appointed. The mandate to act as a substitute in default of Protecting Powers is an adjunct which justifies the ICRC in making further offers of services to that effect. The powers held by the ICRC in its own right, which it can exercise ipso jure by virtue of the prerogatives conferred on it by the Geneva Conventions, must never be confused with the additional mandate it would have if accepted as a substitute for Protecting Powers.

The extent of that additional mandate will now be considered.

5. The extent of the mandate

What tasks would fall to the International Committee if it were accepted as a substitute for Protecting Powers?

Paragraph 3 of common Article 10/10/10/11 provides that if protected persons do not benefit by the activities of a Protecting Power, or of a substitute as defined in the first two paragraphs of that article, a humanitarian organization such as the International Committee may assume the humani-
tarian functions performed by Protecting Powers under the Geneva Conventions.

The ICRC’s mandate would therefore be limited to those humanitarian functions, of which there are two possible interpretations:

- that only some of the functions performed by Protecting Powers under the Geneva Conventions are by their very nature humanitarian; these are the only ones the ICRC could be asked to perform; or
- that all the functions performed by the Protecting Powers under the Geneva Conventions are humanitarian ones, and the only reason for restricting the substitute’s mandate to humanitarian tasks is to exclude those functions of Protecting Powers that have nothing to do with the Geneva Conventions.

The said paragraph 3 may be interpreted in either way, and to decide which is correct the question must be considered as a whole.

Obviously, the tasks that could be assigned to the ICRC as a substitute for Protecting Powers must be determined by reference to those of Protecting Powers themselves. As already mentioned, humanitarian law did not create the institution of Protecting Powers, but availed itself of an already existing institution, some of whose tasks – those concerned with protecting war victims – were codified by the Geneva Conventions. Consequently the functions of Protecting Powers extend beyond the scope of humanitarian law and include activities concerned solely with diplomatic law and practice, such as protection of the public premises (embassies and consulates) of the state represented, custody of its diplomatic and consular seals and archives, transmission of political and military communications, and so on. Evidently, the ICRC cannot be asked to take on activities that have nothing to do with humanitarian law. Paragraph 3 of common Article 10/10/10/11 makes this perfectly clear.

But should the ICRC assume all or only some of the functions of a Protecting Power that derive from the Geneva Conventions? There are two sides to this question: how far is it entitled to perform those functions, and is it free to decide?

The powers of a substitute for Protecting Powers are clearly stated in paragraph 6 of common Article 10/10/10/11, which reads:

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

Therefore, if the ICRC were accepted as a substitute for Protecting Powers it would ipso facto have all the powers entrusted to Protecting Powers by the Geneva Conventions.

Whether it should exercise all those powers depends in the final analysis on their humanitarian relevance: on whether it is in the interests of war victims that the International Committee should perform all the functions devolving on it as a substitute for Protecting Powers, or whether it would be justified in
performing only some of them, excluding those safeguarding the interests of the power of origin but of no direct help to victims.

This question can be answered only by examining the Conventions article by article, taking into account the provisions that expressly and implicitly assign rights and duties to the Protecting Power. That Power is by definition a means of communication between the belligerents. The Conventions repeatedly require parties to a conflict to exchange communications, but do not say how; the Protecting Power, if any, is obviously the most appropriate channel. Notification of the commissioning of hospital ships (Articles 22, 24 and 25 of the Second Convention) is a case in point.

Appendix II of this work (pages 1044–68) contains a comparative table of the respective tasks which the Geneva Conventions entrust to the Protecting Powers and to the ICRC. Only the most important of these need be mentioned here.45

**Tasks common to all four Conventions**

The mandate of Protecting Powers is primarily to help in implementing the Geneva Conventions and to supervise their application (common Article 8/8/8/9). They are given wide powers for this purpose. In particular their representatives are entitled to visit all places, including places of internment, imprisonment and labour, where there are wounded, sick and shipwrecked military personnel in enemy hands, retained medical personnel, prisoners of war, or civilians protected by the Fourth Convention (Article 126, Third Convention; Article 143, Fourth Convention). In cases of disagreement on the interpretation and application of the Conventions, the Protecting Powers are required by common Article 11/11/11/12 to lend their good offices with a view to settling the disagreement.

Common Article 48/49/128/145 stipulates that during hostilities the belligerents must communicate to one another through the Protecting Powers the official translations of the Conventions and the laws and regulations adopted for their application.

**Tasks relating to wounded, sick and shipwrecked members of armed forces and to medical personnel**

The Protecting Power transmits information about the identity of wounded, sick, shipwrecked and dead members of armed forces (Articles 16 and 17 of the First Convention; Articles 19 and 20 of the Second Convention). It notifies the adverse party of the names of the relief societies authorized to co-operate with the armed forces’ medical services (Article 26 of the First Convention), and of the commissioning of hospital ships (Articles 22, 24 and 25 of the Second Convention). It is invited to lend its good offices to facilitate the establishment and recognition of hospital zones and localities (Article 23 of the First Convention).


\textit{Tasks relating to prisoners of war (Third Convention)}

To supervise application of the Convention representatives of Protecting Powers are authorized to go to all places where prisoners of war may be, particularly to places of internment, imprisonment, labour and transit, and to interview prisoners, in particular prisoners’ representatives, without witnesses (Article 126); they must be given lists of the labour detachments under the control of the camps visited (Article 56). They may receive complaints and requests addressed to them by prisoners of war, as well as periodic reports by prisoners’ representatives (Article 78). Prisoners’ representatives must be given every facility for communicating with the representatives of the Protecting Powers (Articles 79 and 81); where the detaining power refuses to approve a prisoner of war elected by his fellow prisoners as their representative, or dismisses him, it must inform the Protecting Power of the reasons for its refusal (Article 79, paragraph 4; Article 81, paragraph 6).

If prisoners of war are transferred from one detaining power to another and the power to which the prisoners have been transferred fails to fulfil its obligations in any important respect, the Protecting Power must inform the state which has transferred them, which must then take effective measures to correct the situation or request the return of the prisoners of war. Such requests must be complied with (Article 12).

With regard to the financial resources of prisoners of war, the Protecting Power takes part in determining the amount of money that prisoners may have in their possession (Article 58, paragraph 1); it must be informed of the reasons for any limitations in their advances of pay (Article 60, paragraph 4) and may check prisoners’ accounts (Article 65, paragraph 1).

The Protecting Power decides on the admissibility of limitations to the correspondence of prisoners of war (Article 71, paragraph 1) and relief consignments sent to them (Article 72, paragraph 3). It supervises the distribution of relief (Article 73) and may organize special transport for relief supplies when other means are disrupted (Article 75). If necessary, it ensures that collective relief is distributed to the addressees by whatever means it sees fit (Article 9 of Annex III).

Representatives of Protecting Powers are free to inspect registers of disciplinary punishments of prisoners of war (Article 96, paragraph 5) and to interview without witnesses prisoners undergoing disciplinary punishment (Article 98, paragraph 1).

The Protecting Power has particular responsibilities in respect of penal sanctions for prisoners of war. It must be informed of offences punishable by the death sentence (Article 100, paragraph 1), and of judicial proceedings against prisoners of war (Article 104, paragraph 1), sentences (Article 107), especially death sentences (Article 101), and appeals by prisoners of war against their sentence (Article 107, paragraph 1). If the death penalty is pronounced the sentence may not be carried out for at least six months after its
notification to the Protecting Power (Article 101). If the accused person has not chosen an advocate or counsel the Protecting Power must procure one (Article 105, paragraph 2). Representatives of the Protecting Power are entitled to attend the trial unless it is exceptionally held in camera in the interests of state security (Article 105, paragraph 5), and may visit prisoners who have been sentenced (Article 108, paragraph 3).

The Protecting Power must be sent the report on the official enquiry that must be conducted after every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person (Article 121).

The neutral members of Mixed Medical Commissions are appointed by the International Committee of the Red Cross, acting in agreement with the Protecting Powers; if the ICRC cannot arrange for their appointment, this must be done by the Protecting Powers (Articles 2 and 5 of Annex II).

The Protecting Power acts merely as an intermediary for the transmission of information on the geographical location of prisoner of war camps (Article 23, paragraph 3), notification of the rate of daily working pay (Article 62, paragraph 1) and transmission of notifications of payment (Article 63, paragraph 3), lists of credit balances (Article 66, paragraph 1), arrangements for mail (Article 69), legal documents (Article 77, paragraph 1), wills (Article 120, paragraph 1) and information on the identity of prisoners of war (Article 122, paragraph 3).

Tasks relating to civilians (Fourth Convention)

General

In order to supervise the application of the Convention, representatives of the Protecting Power are authorized to go to all places where protected persons are, particularly to places of internment, imprisonment and work. They have access to all premises occupied by protected persons and are authorized to interview them without witnesses (Article 143). The Protecting Power is entitled to receive all complaints or requests protected persons may wish to make to it (Articles 30, paragraph 1; 40, paragraph 3; 52, paragraph 1; and 101, paragraph 2).

In order to protect the civilian population against the consequences of war, the Protecting Power is invited to lend its good offices to facilitate the institution and recognition of hospital and safety zones and localities (Article 14, paragraph 3), and may be asked to pass on information about the establishment of neutralized zones (Article 15, paragraph 1).

The Protecting Power may be requested to supervise the distribution of consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians, and consignments of foodstuffs, clothing and tonics for women and children (Article 23).
In aid of aliens in the territory of parties to conflict

As a general rule the Protecting Power must be informed of the reasons for which protected persons have been refused permission to leave the territory of a party to a conflict and of the names of the persons concerned (Article 35, paragraph 3). It must be informed of the names of civilians who have been interned, placed in assigned residence or released, and of the legal or administrative decisions made concerning them (Article 43, paragraph 2). It transmits requests for voluntary internment (Article 42, paragraph 2). The Protecting Power may transmit allowances to protected persons (Article 39, paragraph 3). When protected persons are transferred from one detaining power to another, the Protecting Power performs the same activities on their behalf as for prisoners of war so transferred (Article 45, paragraph 3).

In aid of civilians in occupied territory

The Protecting Power must be informed at once of any transfers or evacuations of protected persons (Article 49, paragraph 4). The Protecting Power is at any time free to verify the state of food and medical supplies in occupied territory (Article 55, paragraph 3). If the whole or part of the population of an occupied territory is inadequately supplied, the occupying power must agree to relief operations by the Protecting Power and must facilitate them by all the means at its disposal; such operations may consist in particular of consignments of foodstuffs, medical supplies and clothing (Article 59, paragraphs 1 and 2). The Protecting Power may be required to guarantee that relief consignments are to be used only for humanitarian purposes (Article 59, paragraph 4) and in cases of urgent necessity to consent to their original destination being changed in the interests of the population of the occupied territory (Article 60). The Protecting Power supervises distributions of relief consignments to the civilian population of occupied territory or may delegate that duty to an impartial humanitarian organization such as the ICRC (Article 61, paragraph 1).

The Protecting Power must be informed of all judicial proceedings against protected persons in respect of charges entailing the death penalty or imprisonment for two years or more (Article 71, paragraphs 2 and 3), and of any judgment involving a sentence of death or imprisonment for two years or more. A record of other judgments must be kept by the court and be open to inspection by representatives of the Protecting Power (Article 74, paragraph 2). Except in the exceptional circumstances mentioned in Article 75, no death sentence may be carried out within six months of its notification to the Protecting Power, which must be informed of any reduction of that period of suspension (Article 75, paragraphs 2 and 3). If the accused person has not chosen an advocate or counsel the Protecting Power must procure one (Article 72, paragraph 2). Representatives of the Protecting Power have the right to attend the trial of any protected person unless the hearing has, as an
exceptional measure, to be held *in camera* in the interests of the security of the occupying power (Article 74, paragraph 1). Representatives of the Protecting Power may visit accused or convicted prisoners (Article 76, paragraph 6).

**In aid of civilian internees**

Here the tasks of the Protecting Power are similar to those it performs in aid of prisoners of war.

- Representatives of the Protecting Power visit places of internment (Article 143) and are entitled to receive any complaints or requests made by internees (Article 101, paragraph 2). They keep in touch with Internee Committees (Article 102, paragraph 1, and Article 104, paragraph 3) and must be informed of the reasons for which the detaining authority refuses to approve or decides to dismiss a committee elected by the internees (Article 102, paragraph 2). They must be given lists of the labour detachments under the authority of the places of internment they visit (Article 96).
- The Protecting Power may transmit allowances to internees and check their personal accounts (Article 98, paragraphs 2 and 3).
- Representatives of the Protecting Power are entitled to supervise the distribution of the relief supplies they are responsible for forwarding to internees (Article 109, paragraph 3, and Annex II, Article 8). If necessary the Protecting Power may organize special means of transport to convey relief supplies to internees (Article 111, paragraph 1).
- Representatives of the Protecting Power are free to inspect the records of disciplinary punishments given to internees (Article 123, paragraph 5); they may visit punishment cells and interview without witnesses internees undergoing disciplinary punishment (Article 125, paragraph 4).
- Whenever legal proceedings are instituted against civilian internees in the national territory of the detaining power, the Protecting Power is entitled to undertake on their behalf the same activities which it is authorized to carry out in the case of proceedings instituted against civilians in occupied territory (Article 126).
- The Protecting Power must be sent a report on the official enquiry that must follow any death or serious injury of an internee caused or suspected to have been caused by a sentry, another internee or any other person (Article 131).
- The Protecting Power acts as an intermediary by transmitting information on the geographical location of places of internment (Article 83, paragraph 2) and measures concerning internees’ relations with the outside world (Article 105), legal documents sent to or by internees (Article 113, paragraph 1), death certificates (Article 129, paragraph 3), and information on the identity of internees (Article 137, paragraph 1).
These are the main responsibilities which the Geneva Conventions confer upon the Protecting Powers. The list is not exhaustive, for common Article 8/8/8/9 requires Protecting Powers to co-operate in applying the Conventions. This article unquestionably allows the Protecting Powers to offer their good offices for the implementation of all provisions contained in them, including those for which they have no specific mandate. These include early repatriation, before the end of hostilities, of seriously wounded or seriously sick prisoners of war (Article 109 of the Third Convention), and repatriation of civilians who are in the territory of a party to the conflict or in occupied territory, (Articles 35 and 48 of the Fourth Convention). There can be little doubt that Protecting Powers, although not specifically mentioned in these articles, are authorized to help in implementing them, for it is firmly established, in law and in international practice, that a treaty has to be interpreted in the light of any relevant rules of international law. And they do have vast experience in repatriation, having carried out – among others – many operations for the repatriation of civilians and seriously wounded military personnel in both world wars.

So much for the terms of reference; now back to the question. Since paragraph 6 of common Article 10/10/10/11 authorizes the ICRC, whenever appointed as a substitute in default of Protecting Powers, to carry out all the functions normally performed by Protecting Powers, should it assume all of them or can it decline certain tasks that would be of too little benefit to war victims to be classed as humanitarian tasks in the sense of paragraph 3 of common Article 10/10/10/11?

The first answer to be considered is that of the ICRC itself. Since the Diplomatic Conference of 1949 clearly accepted that the International Committee could not be required to assume all the tasks incumbent on Protecting Powers under the Geneva Conventions, but only those of a humanitarian character, it is up to the ICRC to decide, subject to humanitarian law, what tasks it regards as in line with its aims as a humanitarian organization and is prepared to carry out.

There have been great changes in the ICRC’s position in this respect. At the 1949 Conference its representatives stated that it could not be a genuine substitute for Protecting Powers and could not assume all the tasks thereof. The Conference endorsed that position. In its memorandum of 1 May 1951 the International Committee stated which tasks it was prepared to perform in the absence of a Protecting Power, and the conditions on which it could undertake them. It excluded most scrutiny of the application of the Geneva Conventions, considering that such an activity was incompatible with the purpose, the nature and the limits of the ICRC’s work as a quasi-substitute. It accordingly refused to supervise application of the provisions referring to:
• the attitude to be observed by belligerents in areas of military operations (First and Second Conventions, except for the provisions concerning retained medical personnel; Articles 17–20 of the Third Convention and Part II of the Fourth Convention);
• the measures to be adopted by belligerents towards their own nationals and their own property (issue of identity documents to the armed forces, use of the emblem, etc.); and
• many of the provisions relating to occupied territory (all of Section III in Part III of the Fourth Convention except Articles 50 (protection of children), 56–8 (hygiene and public health, hospitals), 59 and 61 (relief), 63 (National Red Cross or Red Crescent Society), 49, paragraph 3 (conditions in which transfers and evacuations take place), 51, paragraph 3, and 52, paragraph 1 (working conditions)).

The ICRC also pointed out that other activities could give rise to difficulty, namely the transfer of prisoners of war or protected civilians from one detaining power to another (Third Convention, Article 12; Fourth Convention, Article 45), the establishment of hospital and safety zones and localities (First Convention, Article 23; Fourth Convention, Article 14), supervision of distributions of relief supplies to the civilian population (Fourth Convention, Article 23), monitoring of the financial resources of prisoners of war and civilian internees (Third Convention, Articles 58–68; Fourth Convention, Articles 97 and 98), and judicial assistance to prisoners of war and civilian internees (Third Convention, Articles 100–8; Fourth Convention, Articles 72–5 and 126). It can hardly be denied that after all these reservations there was little left of the duties of a substitute for Protecting Powers.

Yet although the ICRC is often over-cautious in matters of theory and policy, it rarely lacks audacity in bringing protection and assistance to victims of conflicts. No Protecting Powers have been appointed in most conflicts since 1949; as a result the ICRC has progressively extended its field of activities and assumed more and more of the duties normally assigned to them. Its work in the territories occupied by Israel since June 1967, bringing help where it was needed although it had no mandate as a substitute for a Protecting Power, perfectly illustrates this.

As its reservations in its memorandum of 1 May 1951 had lost all their relevance with the passage of time, the International Committee reviewed its position and stated categorically at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law convened in Geneva in 1971 that it was prepared to undertake all the tasks incumbent on Protecting Powers under the Geneva Conventions:

... the representative of the ICRC explained that the Committee had recently given careful attention to this question and that it had arrived at the conclusion that all the tasks falling to a Protecting Power under the Conventions could be
considered humanitarian functions. In other words, the ICRC was ready to take upon itself all the functions envisaged for Protecting Powers in the Conventions.\textsuperscript{56}

The International Committee confirmed this position at the second session of the Conference of Government Experts, as follows:

All the functions of Protecting Powers under the Conventions were humanitarian in nature and ... the ICRC was ready to take on those functions whenever necessary and possible.\textsuperscript{57}

In his closing address to the Conference of Government Experts the ICRC President took the opportunity to confirm that the International Committee was always ready to offer its services. He said:

... the ICRC proposes to make use of the power conferred on it to assume the role of substitute for the Protecting Power whenever it considers it necessary and possible to do so. This role should not, however, be automatically imposed on the ICRC. Only when all other possibilities were exhausted would the ICRC offer its services. Any such offer would then require the agreement of the Parties concerned. To fulfill those functions the ICRC will obviously need to be supplied with adequate funds and staff. Finally, the ICRC would like to make it clear that, should it agree to act as substitute, it does not intend in any way to weaken the system of Protecting Powers provided for in the Conventions.\textsuperscript{58}

The ICRC confirmed this proposal in the documents it submitted to the 1974–7 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law,\textsuperscript{59} and at that Conference.\textsuperscript{60}

The question of how paragraph 3 of common Article 10/10/10/11 was to be interpreted was thus given a clear reply consonant with the ICRC’s humanitarian vocation.

* *

All things considered, the International Committee’s long-standing reservations against offering its services as a substitute for Protecting Powers were hardly justified.

As has been shown, the main stumbling block was that common Article 8/8/8/9 required the Conventions to be applied under the scrutiny of the Protecting Powers. While the International Committee has always done what it could to co-operate in applying the Geneva Conventions, it has often emphatically denied that it was exercising supervision of the belligerents’ behaviour.

However, there is no real problem here. It is obvious from the discussions before common Article 8/8/8/9 was adopted that whilst the Diplomatic Conference was determined to extend the remit of Protecting Powers to cover all persons protected by the Geneva Conventions, it did not intend to change the nature of the scrutiny made by those Powers. The word ‘scrutiny’ has to be interpreted in the light of their previous practice. Now, the practice of
Protecting Powers and the practice of the International Committee are as like as two peas. This is clear from the following extract from the report by the Special Committee of the 1949 Conference’s Joint Committee, regarding the adoption of the word ‘scrutiny’ in the English text, and the word ‘contrôle’ in the French text:

The fundamental concept was that the Protecting Power could not give orders or directives to the Detaining Power. It was entitled to verify whether the Convention was applied and, if necessary, to suggest measures on behalf of protected persons.\textsuperscript{61}

The International Committee has always done just this.

What confirms the above interpretation is that in the two most important provisions as regards scrutiny of the application of the Conventions (Article 126 of the Third Convention and Article 143 of the Fourth Convention), the ICRC’s responsibilities coincide exactly with those of the Protecting Powers. This shows that the point at issue is not the nature of scrutiny, but the extent of tasks.

Obviously, if the ICRC were appointed as a substitute for Protecting Powers it would have to perform tasks additional to those already assigned to it under the Geneva Conventions, otherwise there would be no reason to appoint it as a substitute. The extent of these additional tasks must therefore be determined by comparing the ICRC’s usual responsibilities with those of Protecting Powers.

There are three main groups of additional activities:\textsuperscript{62}

a) \textit{Liaison work}, such as communicating laws and regulations on the application of the Conventions and notifying the commissioning of hospital ships and the geographical location of prisoner of war and civilian internee camps. These activities fully correspond to the ICRC’s recognized function as a neutral intermediary and cause no difficulties whatsoever.

b) \textit{Judicial assistance} to prisoners of war, and civilians protected by the Fourth Convention, against whom legal proceedings have been instituted. The ICRC proved at the end of the Second World War that it could give such persons legal assistance on an \textit{ad hoc} basis. There would therefore be nothing to prevent it from giving such legal assistance if it were a substitute for a Protecting Power, provided it had the means to do so.

c) \textit{Verification} of the state of the food, clothing and medical supplies of the population of occupied territory, and supervision of distributions of relief supplies destined for the civilian population, which can be forwarded only with the consent of the adverse party (by being allowed through blockades). This may be a large-scale activity of the utmost importance, for the party authorizing free passage of the consignments may insist on the supervisory body being able to guarantee that the adverse party cannot take advantage of the consignments by using them instead of merchandise it would otherwise have to produce or supply. This implies scrutiny of most of the economic management of the occupied territory.
At the time of the relief operation in Greece (1941–4) the ICRC refused to carry out such scrutiny, and responsibility for it was eventually entrusted to the Swedish government. Since then, however, the ICRC has carried out several relief operations on a similar scale in Nigeria, Bangladesh, Lebanon and Kampuchea for which it had to assess the food situation in the countries concerned, if only to ascertain needs and priorities. It has also made several highly detailed evaluations of the medical and health situation of the civilian population in the territories occupied by Israel. There is no reason to believe that the ICRC would not be able to carry out the scrutiny mentioned in the Fourth Convention, in spite of difficulties that might be considerable.

In short, there appears to be no insurmountable obstacle that would prevent the ICRC, were it appointed as a substitute for Protecting Powers, from assuming all the responsibilities incumbent on Protecting Powers under the Geneva Conventions.

It remains to be seen whether all these tasks are humanitarian ones in the sense of paragraph 3 of common Article 10/10/10/11.

Surely, the mere fact that these tasks proceed from the Geneva Conventions strongly suggests that they are of a humanitarian nature. There is a great cohesion of all the treaty provisions. A part of them cannot be neglected without weakening all of them; thus, if prisoners of war and civilian internees are subject to arbitrary sentences against which they have no appeal, any attempt by a substitute for Protecting Powers to monitor their conditions of detention would soon be illusory. A task is humanitarian not so much because of its legal basis as because of the spirit in which it is carried out. If the International Committee were accepted as a substitute in default of Protecting Powers it could not carry out the additional tasks that would then devolve upon it with any other objective than the one towards which all its energies and activities are directed: to give war victims protection and assistance in all circumstances.

To conclude, if the ICRC is approved as a substitute for Protecting Powers it should endeavour to carry out all the tasks assigned to Protecting Powers by the Geneva Conventions, provided it has the necessary resources.

What resources would it need?

In the first place, adequate personnel. Transmitting all kinds of documents, regularly visiting places of internment, sending representatives to trials of protected persons, verifying the state of supplies available to the population of occupied territories, and supervising distributions of relief for the civilian population may require far more staff than the ICRC normally has. But this must never stand in its way. If it cannot recruit sufficient numbers of qualified staff (lawyers, doctors, accountants and others) in Switzerland it can always engage nationals of other neutral states. The relevant provision in the Conventions, paragraph 1 of common Article 8/8/8/9, applies equally to the Protecting Power and its substitute.
Secondly, funds. Recruiting specialized staff, paying fees for lawyers engaged to defend accused persons, and organizing special transport for relief consignments may cost more than the ICRC’s limited resources can stand. The Conventions say nothing about financial arrangements between the Protecting Power (or its substitute) and its principals; however, since by definition the Protecting Power represents a state, that state should, according to established practice, defray its expenses.\(^{65}\) There is no reason why there should be a different procedure for the substitute. In the first place it is up to the protected persons’ power of origin to defray the ICRC’s expenses as a substitute for a Protecting Power. If it cannot do so its allies or neutral states should contribute.

Is there a risk that some states would not appoint the ICRC as a substitute for a Protecting Power for fear of unduly heavy expenses? This should not happen. Compared with the monstrous cost of modern war, ICRC expenses, even for all the humanitarian tasks normally assigned to Protecting Powers, would be ridiculously low \(^ {66}\) in proportion to the humanitarian services that a state can expect from a Protecting Power or its substitute, which are after all to safeguard its nationals in the hands of the adverse party.

One more question: the Protecting Power is by definition the trustee of a state; if the International Committee were appointed as a substitute for a Protecting Power, would it too act as the trustee of the state that had appointed it?

After consideration, the ICRC answered with a decided negative.\(^{67}\)

Perhaps its answer should have been less absolute. Whilst it is true that the International Committee can never be subservient to a party to a conflict, because of its humanitarian mandate and its role as a neutral intermediary,\(^ {68}\) the fact remains that if it were appointed as substitute for a Protecting Power it would have to make regular reports on its activities and on the situation of the persons entrusted to its care. In this respect its accountability for its activities to the power of origin of the protected persons would be greater than if it were not appointed as such. This responsibility derives from the very nature of the substitute’s mandate, and is confirmed by paragraph 4 of common Article 10/10/10/11 as follows:

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend …

Surely this greater responsibility could not possibly cause any difficulty, for even without being appointed as a substitute the International Committee has regularly sent its delegates’ reports on their visits to places of detention to the powers of origin of the persons concerned. All that would be needed would be to extend this practice to the ICRC’s new activities as a substitute for a Protecting Power. The only difference is one of degree, and does not really affect the International Committee’s relations with the parties to a conflict.\(^ {69}\)
To sum up, it is submitted that the International Committee should not hesitate to offer its services as a substitute for a Protecting Power whenever it can expect that it would then be able to protect war victims more effectively. It should also consider assuming all the tasks assigned to Protecting Powers by the Geneva Conventions, if the states concerned provide the necessary means.

The question now to be examined is whether these conclusions are confirmed by practice.

6. The development of practice

What use have the belligerent states and the International Committee made of the possibilities offered by common Article 10/10/10/11?

Probably no era apart from that of the two world wars has been as troubled, or has seen as many conflicts, as the one beginning in 1945 with the capitulation of Germany and Japan. Most conflicts since then have been non-international armed conflicts in which there was no question of appointing Protecting Powers. There were nevertheless many international armed conflicts, from the Arab-Israeli conflict in 1948 to the Gulf War (1990–1) and the ongoing conflict between Ethiopia and Eritrea (1998–), yet Protecting Powers were appointed in only five of them. There was therefore no lack of opportunity to use the substitution procedures laid down in the 1949 Conventions, but so far as I know, only in five cases was consideration given to entrusting the ICRC with some or all of the tasks of Protecting Powers.

Before charting the successes and failures of state practice and ICRC practice in replacing Protecting Powers in the absence thereof, these five cases should be examined.

i) The Suez conflict (1956)

In the Suez conflict, Switzerland was appointed to protect British and French interests in Egypt, and India to protect Egyptian interests in the United Kingdom and France. As Egypt categorically refused any kind of official relations with Israel, no Protecting Power was appointed to represent Egyptian interests in Israel or Israeli interests in Egypt. To protect the victims of the conflict, especially the civilian population in Sinai and stateless persons in Egypt, who had no natural protector, the International Committee proposed to Egypt and Israel that it should act as substitute for a Protecting Power in accordance with paragraph 3 of common Article 10/10/10/11.

The Israeli government accepted this offer of services, subject to reciprocity, but the Egyptian government made no reply. As recommended by its head of mission in Cairo, the ICRC made no further attempt to obtain formal acceptance of its offers of services. With the agreement of the Egyptian authorities, however, the ICRC delegation in Egypt fulfilled many of the duties of Protecting Powers, including consular work, in aid of the stateless
persons who were being obliged to leave the country. In addition, the ICRC performed the tasks assigned to it by the Conventions in aid of the civilian population in the Gaza Strip and Sinai, and of prisoners of war on both sides.76

**ii) The Irian Jaya affair (1961–2)**

In August 1960 diplomatic relations between the Netherlands and Indonesia were broken off as a result of the dispute over West New Guinea (Irian Jaya). The Netherlands government asked the United Kingdom to protect its interests in Indonesia, whereas Egypt represented Indonesian interests in the Netherlands. In the spring of 1961 the Indonesian government withdrew its approval of British representation of Netherlands interests and announced that in future it would not allow Dutch interests to be protected by another state.77

The Netherlands government consequently asked the International Committee to protect the humanitarian interests of its nationals and to send a mission to Indonesia to give them any necessary assistance (mainly paying out pensions and allowances to them and facilitating the repatriation of those wishing to return to the Netherlands).78

The Indonesian government allowed the ICRC to act for the Netherlands government, but only within narrow limits: the Indonesian Red Cross Society was to make the said payments and organize the departure of repatriates, the ICRC merely liaising between the Society and the Netherlands authorities.79

On this basis the ICRC sent two missions to Indonesia, the first from 30 September to 24 December 1961, and the second from 13 March to 5 May 1962.80

In August 1962 an agreement between the Netherlands and Indonesia ended the dispute which had led to the severance of diplomatic relations between the two states and to the situation in which the ICRC had given its assistance.

Throughout this incident the International Committee emphatically maintained that it was not acting as substitute for a Protecting Power, nor representing Netherlands interests. It nonetheless did send two missions to Indonesia because Netherlands nationals there were being deprived of the protection to which aliens are entitled according to international usage. The limited tasks assigned to the ICRC were a specific part of the duties of a Protecting Power.

**iii) The Vietnam War**

In the autumn of 1965 the press reported that the government of the Democratic Republic of Vietnam intended to put American airmen held there on trial as war criminals.

To protect its nationals, and after vainly requesting several governments to represent American interests in North Vietnam, the United States government
asked the ICRC to offer its services to the Hanoi government and seek acceptance as substitute for a Protecting Power.81

The ICRC warned the American authorities that any such approach had no chance of success and might endanger the American prisoners. The United States government nevertheless repeated its request, and confirmed it in writing after talks between Ambassador Harriman and the ICRC in Geneva on 5 May 1966.82 Considering that as a neutral intermediary it was bound to transmit to the adverse party any proposal for application of the Geneva Conventions, the ICRC felt obliged, although the prospects were poor, to forward the American request to the government of the Democratic Republic of Vietnam.83 It did so on 25 May 1966, emphasizing in its covering letter that it was equally concerned for the fate of the victims of the American air raids over North Vietnam.84

As was to be expected, Hanoi gave the ICRC’s approach a chilly reception. The Foreign Ministry’s letter of 27 July 1966 restated the position of the Democratic Republic of Vietnam with regard to the Vietnamese conflict and declared that there was no question of applying Article 10 of the 1949 Geneva Convention.85

This refusal was absolute and final.

iv) The Arab-Israeli conflict

After the Six-Day War and the Israeli occupation of the Golan Heights, the West Bank, the Gaza Strip and Sinai, the idea of appointing Protecting Powers was equally distasteful to the Arab States, which refused to enter into official relations with Israel, and to the Israeli government, which argued that the Fourth Geneva Convention did not apply to the occupied territories. The question of appointing the ICRC as a substitute therefore became acute. Inevitably, it had to consider offering to assume the humanitarian tasks normally performed by such Powers.

In April 1968 the ICRC sent the governments of the states concerned (Israel, Jordan, Lebanon, Syria and the United Arab Republic) a memorandum setting out the relevant provisions of the Conventions and, without offering its services, emphasizing that all parties to the conflict were obliged to appoint a Protecting Power or a substitute. Only the Jordanian government took the trouble to reply, and then only to inform the ICRC that it disagreed.86

In spring 1969, in the course of an official visit to Israel, the ICRC Vice-President sounded out the Israeli government’s attitude as to a possible offer of services by the ICRC to act as a substitute for Protecting Powers. The results were not encouraging. The Israeli government was against the proposal because it was afraid of restricting its freedom of action to no good purpose. For their part, the Arab governments disliked the idea because they objected to any step that might be construed as implicitly recognizing Israel. The ICRC therefore decided not to submit to either side offers of services that were bound to be refused.87
The preparations for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law revived interest in this question. As some delegates still had the incorrect impression that the ICRC was refusing to act as substitute for Protecting Powers, it assured the Conference of Government Experts meeting in Geneva in spring 1971 that it would accept those responsibilities whenever there was no insurmountable obstacle to its doing so.88

This general statement held good for the Middle East conflict and did not pass unnoticed by the states involved.

In August 1971 the Egyptian government, protesting against the expulsion of inhabitants of the Gaza Strip, asked the ICRC to use its recognized right to protect the civilian population in accordance with Article 11, paragraph 3, of the Fourth Convention. The phrase ‘substitute for a Protecting Power’ was not used, but reference to it was clear enough. This request raised unexpected hopes, but the ICRC was wary of entering too lightly into an engagement and asked the Egyptian authorities to clarify their statement, and to specify whether they proposed to recognize it as a substitute with reference to the Fourth Convention only, or in the sense of all four Conventions of 1949. It received no reply.89

This question was nevertheless high on the agenda of the three delegations which the ICRC sent to the Middle East in December 1971. The first went to Egypt, the second to Israel and the third to Jordan, Syria and Lebanon.90 It had been decided that the ICRC would accept the Egyptian government’s request, offer the Israeli government its services as a substitute for a Protecting Power without setting any prior conditions, and make known its position to the other states engaged in the Middle East conflict.91

But in fact this three-pronged approach looked less like a formal offer of services than an attempt to sound out the authorities. The International Committee’s representatives informed them that the ICRC was willing to offer all states concerned its services as a substitute for a Protecting Power, in accordance with paragraph 3 of common Article 10/10/10/11.92 In Jerusalem and Cairo the ICRC confirmed this in writing.93

Replies were far from encouraging. The Egyptian government stated that it was prepared to accept the International Committee’s offers, but only within the confines of the Fourth Convention,94 thus stripping the proposal of any interest for Israel. The Israeli government intimated that it would probably refuse a formal offer but would in practice give the ICRC facilities for the performance of certain tasks.95 The Jordanian government announced that it was prepared to give favourable consideration to the ICRC’s offer of services but could do nothing in that regard without the agreement of Egypt and Syria. The Syrian government declared that it would examine the International Committee’s offers when they were submitted to it. Only the Lebanese government said that it was willing to receive the ICRC’s offers and give them favourable consideration.96
The International Committee consequently felt that there was no point in sending a note to those governments confirming its approaches, and that it would be better to wait for a more auspicious occasion to offer its services to the belligerents.97

But the matter could not be left pending indefinitely, and on reconsideration the ICRC decided to confirm its previous initiatives and make a formal offer of services as substitute for a Protecting Power. It did so on 25 September 1972 98 in notes sent to the permanent missions of the countries concerned. Apparently this new approach achieved nothing.

Thus, although the ICRC made various approaches to these governments and sounded them out on several occasions, one cannot help feeling that in this case it lacked determination.

Negotiations were difficult for two reasons:

a) The Israeli government contended that the Fourth Convention did not apply to the territories occupied in June 1967, thereby undermining the legal basis for the ICRC to carry out the tasks normally entrusted to Protecting Powers.

b) The Arab States themselves made no real attempt to appoint a Protecting Power or a substitute and gave only niggardly support to the ICRC’s work in the occupied territories.

The International Committee therefore had reason to fear that if it were accepted as a substitute for a Protecting Power it might have wide responsibilities, but neither the legal basis nor the means to execute its new mandate properly.

Although its offers of services to assume that role were not formally accepted, the ICRC, working informally in the occupied territories by virtue of its right of humanitarian initiative, nonetheless managed to carry out many of the humanitarian tasks normally entrusted to Protecting Powers.99

v) The Indo-Pakistan conflict

In the conflict between India and Pakistan of December 1971 Switzerland was entrusted with the protection of Indian interests in Pakistan and Pakistani interests in India. Conversely, as Pakistan was opposed to any official relations with Bangladesh, Switzerland merely lent its good offices between those two countries. In the spring of 1973, however, the Bangladesh government announced its intention to ask the government of India to extradite 195 Pakistani officers to be tried in Bangladesh for crimes committed in East Pakistan before Bangladesh became independent. Pakistan threatened to prosecute an equal number of Bengali servicemen for treason. Here again, the question of legal assistance to prisoners of war arose. After internal discussion, the International Committee decided in principle to offer its services to Pakistan and Bangladesh to assume the functions normally performed by Protecting Powers, but thought it preferable
not to do so until the prisoners were extradited. In the end they were repatriated, so the matter was closed.  

What assessment should be made of state practice and that of the ICRC with regard to the appointment of a substitute in default of Protecting Powers?

Clearly, the hopes raised by common Article 10/10/10/11 have failed to materialize. Neither the ICRC nor any other body has been formally appointed as a substitute for Protecting Powers, although opportunities have not been lacking. International law has undoubtedly suffered a setback.

What are the reasons for this?

The blame rests primarily with the belligerent states. It was up to them to take all appropriate steps to ensure that their nationals in enemy hands were protected and they should have appointed a Protecting Power or a substitute for that purpose. Instead, their disquieting apathy in most cases showed regrettable indifference to the fate of their nationals.

The reasons for this inertia were usually political. They stemmed from arguments about the nature of the conflict or about the parties’ legal status. The main worry was that the appointment of a Protecting Power or a substitute would be interpreted as a first step towards recognition of an enemy who was denied legal existence. The objections to appointing Protecting Powers were usually also raised to appointing a substitute.

Hence the failure of the substitution procedure provided for in common Article 10/10/10/11. Where it would have been possible to appoint a substitute it was unnecessary, for Protecting Powers could be appointed. Where it was necessary it was not possible; the reasons for not appointing Protecting Powers were also reasons for not appointing a substitute.

It must be acknowledged, however, that the International Committee shares the blame. In questioning both its competence to offer its services as a substitute and the extent of the tasks it was prepared to perform, it persisted for too long in pursuing a policy and practice that had fallen behind treaty law. One cannot help feeling that the Committee’s reservations, which were based on a mistaken idea of the role and tasks of Protecting Powers, betrayed its nervousness about taking on responsibilities that were not clearly defined and required material means and resources that it was not sure it would possess.

In the Arab-Israeli conflict the International Committee made numerous approaches and put out many feelers. It was, however, too indecisive to act in good time on paragraph 3 of common Article 10/10/10/11 and failed to take the only step truly in accordance with its role, namely to submit to all warring parties a formal offer of services clearly defining the tasks the ICRC proposed to perform and the conditions under which it was prepared to carry them out. This approach alone would have obliged each party to shoulder its responsibilities in full. The hesitancy so long characteristic of the International Committee’s approaches reflected inadequate legal analysis.
It is therefore not surprising that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law received many proposals for reform of the mechanisms to monitor application of the rules, and in particular for new means of substitution in default of Protecting Powers. These proposals must now be examined before determining whether war victims are likely to be better protected as a result.


Any extension of the humanitarian rules is likely to remain ineffective unless accompanied by a corresponding extension of the mechanisms for their application. Small wonder therefore that one of the main purposes of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law was to reinforce those mechanisms. Because of practical experience since 1949, the Conference was particularly concerned with the problems of substitution in cases of failure of the Protecting Powers system, and examined this question at length. Two aspects of it are particularly relevant to the present discussion. They are:

a) the designation of a substitute for a Protecting Power;
b) the extent of the substitute’s mandate.

Appointment of a substitute for Protecting Powers

The crucial question around which all discussion revolved was whether appointment of a substitute for a Protecting Power should be left entirely to the initiative of parties to conflict, or whether it was possible to prescribe a procedure that belligerents would have to observe.

The International Committee submitted to the Diplomatic Conference alternative draft articles reflecting the divergent opinions that had been argued at the Conference of Government Experts. These two variants came after the provisions for appointment of the Protecting Powers, and were as follows:

Proposal I

If, despite the foregoing, no Protecting Power is appointed, the International Committee of the Red Cross may assume the functions of a substitute within the meaning of Article 2(e), provided the Parties to the conflict agree and insofar as those functions are compatible with its own activities.

Proposal II

If, despite the foregoing, no Protecting Power is appointed, the Parties to the conflict shall accept the offer made by the International Committee of the Red
Cross, if it deems it necessary, to act as a substitute within the meaning of Article 2(e).103

Under Proposal I, the appointment of a substitute for a Protecting Power was subject to the agreement of the belligerents, whereas Proposal II appeared to be an extension of paragraph 3 of common Article 10/10/10/11, for it obliged the parties to the conflict to accept the ICRC’s offers of services. The divergence between the two proposals was, however, more apparent than real, for the ICRC representatives made it clear both to the Conference of Government Experts and to the Diplomatic Conference that the ICRC would make such offers only with the agreement of the parties to the conflict concerned.104 In substance, the two proposals were identical: the functions of a substitute could be assumed only with the consent of the parties to the conflict, a consent those parties could freely refuse. Both proposals thus fell short of paragraph 3 of common Article 10/10/10/11, which reads:

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.105

Many draft amendments were put forward at the Conference. Some emphasized that a substitute for a Protecting Power could be appointed only by the free choice of the parties to the conflict. The others, on the contrary, proposed adopting a last-resort procedure binding on the belligerents.106

The proposals were debated at length by Committee I of the Diplomatic Conference and in Working Group A of that Committee.107 Generally speaking, there were three currents of opinion.

On the grounds of national sovereignty the socialist states, France and some Third World countries including Algeria and Madagascar opposed any proposal that did not make the appointment of a substitute subject to the consent, which could be freely given or refused, of both parties.108 The delegates of those countries wanted a purely consensual system. In their view it was unthinkable that the humanitarian objectives of the Conference should override the principle of national sovereignty.109 Some delegates declared that their government would make reservations, or would even refuse to ratify Protocol I, if the formula adopted was in the least compulsory.110

Most Western countries and Third World states took the contrary view that it would not be possible to protect war victims if the mechanisms for the application of treaty provisions were to depend entirely on the belligerents’ good will. They considered that since the appointment of Protecting Powers was to be subject to the consent of the parties to conflict, an automatic back-up institution should be devised that would not depend on the free choice of the belligerents and could serve, so to speak, as a safety net of humanitarian protection. The contracting parties should therefore pledge in advance to accept offers by the ICRC or any other impartial humanitarian organization
to assume the humanitarian tasks normally performed by Protecting Powers. Only by adopting an obligatory substitution procedure could the protection of war victims in all circumstances be ensured.\textsuperscript{111}

For reasons obviously connected with the Middle East conflict, the Arab States demanded that in the absence of a Protecting Power there should be an entirely automatic procedure for the appointment of a substitute, without any intervention by the power of origin.\textsuperscript{112}

The unyielding opposition of the socialist states to any compulsory procedure, the fear that they would make reservations against any mandatory provision, and the Western countries’ anxiety to reach a solution that could be adopted by consensus, led Working Group A to propose a text that can only be regarded as the lowest common denominator.\textsuperscript{113} Committee I adopted the proposal by fifty-three votes in favour and ten against, with eight abstentions;\textsuperscript{114} the whole article was then adopted by consensus, first of all by Committee I\textsuperscript{115} and then by the plenary meeting of the Conference.\textsuperscript{116}

The result was Article 5, paragraph 4, of Additional Protocol I:

If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.\textsuperscript{117}

This provision obviously falls short of paragraph 3 of common Article 10/10/10/11 of the 1949 Geneva Conventions by making the appointment of a substitute subject on two counts to the consent of the parties to conflict. This is equivalent to granting those parties a dual right of veto:

a) The offer of services by the International Committee or by any other suitable organization is subject to the favourable outcome of prior consultations.

b) The substitute may not take up its duties save with the consent of the parties to conflict.

The second condition is undoubtedly a step backwards compared with paragraph 3 of common Article 10/10/10/11, but this is not necessarily to be regretted. A more limited but effective rule does more to protect war victims than an over-ambitious impracticable one. Now, as stated above, paragraph 3 of common Article 10/10/10/11 had not so far been applied de jure. The International Committee has repeatedly stated that it would not act as substitute for a Protecting Power without the consent of the parties to the conflict concerned. After all, the ICRC or any other organization could hardly conceive of doing the work assigned to Protecting Powers unless the states concerned agreed. In practice, it would be impossible. Therefore the second
condition, regressive though it is, has at least the virtue of reconciling the law with the realities of international relations, for states nowadays are not ready to agree in advance that an unspecified organization should wield the wide powers of substitute for a Protecting Power in their territory. The new provision may be less demanding than the previous rule, but at least it has the merit of being more realistic. It could be expected to work all the better for that.

It is therefore all the harder to understand why the first condition was imposed, namely why offers of services from the ICRC or any other suitable organization were made subject to the results of prior consultations with the belligerents.

It might be argued that since the parties’ consent has to be obtained anyway, the requirement of favourable prior consultations is not an additional condition, and that the two conditions are in reality only one. This argument does not hold water: the two conditions operate neither at the same level nor at the same time. The second condition grants parties to conflict the right to accept or refuse offers of services made by a suitable organization. The first condition allows parties to conflict to prevent that organization from offering its services. It therefore operates before the offer of services is made, whereas the second condition operates afterwards.

Now, there are times when a humanitarian organization such as the ICRC, which is interested in all aspects of protection of war victims, may feel that prior consultations have gone on long enough. It should then be able to offer its services to the parties to a conflict. It is up to them to refuse the offer if they see fit, but even if it comes to nothing, it will at least have the advantage of making them give a definite answer and of highlighting their responsibilities.

The first condition, on the contrary, makes it easy for any belligerent to allege that prior consultations have not yet produced conclusive results, so ensnaring the humanitarian organization in the toils of endless consultations. This condition merely encourages procrastination.

No wonder, then, that the head of the ICRC delegation stated the International Committee’s specific reservations to paragraph 4 of Article 5, as follows:

Paragraph 4 was concerned only with the role of substitute which the ICRC might be called upon to play. That role was therefore quite distinct from, and could in no way affect, the ICRC’s main role under the Geneva Conventions. The Conventions expressly assigned many tasks to the ICRC, and they recognized, in Article 9 common to the Geneva Conventions of 1949 (Article 10 of the fourth Convention) that the ICRC had a general right of initiative in respect of the activities it might have to undertake on behalf of the victims of armed conflicts, with the agreement of the Parties concerned. The new provision could in no way restrict, therefore, the ICRC’s traditional role ....

His second comment concerned the procedure provided for in paragraph 4 for a possible offer by the ICRC, after undertaking consultations, to assume the task of substitute for the Protecting Powers. If, however, there had to be such
consultations, without publicity of course, the ICRC could obviously not keep the result secret. It would have to say in the end whether its collaboration was accepted or not.\textsuperscript{119}

It is also important to bear in mind that whatever the results of the prior consultations, the ICRC is still entitled to offer its services as a substitute for a Protecting Power. Its right of humanitarian initiative, confirmed by common Article 9/9/9/10 of the Geneva Conventions of 1949 and Article 81, paragraph I, of Additional Protocol I, is sufficient authority for this. Moreover, its prerogatives under paragraph 3 of common Article 10/10/10/11 are undiminished.\textsuperscript{120} Article 5, paragraph 4, of Protocol I is nevertheless bound to cause difficulties, if only because the treaties contain contradictory rules. Equally certainly, the belligerents will find in it an arsenal of arguments which they can use to block the appointment of a substitute if no Protecting Power has been appointed, and so avoid having to submit to outside scrutiny. And without that scrutiny protection of war victims is all too often a myth.

‘Hell crowns itself with towers like Monteriggioni’, said Dante.\textsuperscript{121} The Diplomatic Conference has crowned the belligerents’ national sovereignty with a double ring of towers. No doubt the price for it will be paid by the victims of war. Frankly, if the majority of states represented at the Diplomatic Conference had wanted to deal a mortal blow to the institution known as ‘substitute for the Protecting Power’ they would not have acted otherwise.

This is all the more surprising since the Diplomatic Conference indirectly extended the substitute’s mandate by assigning new tasks to Protecting Powers. This will now be discussed.

\textit{The extent of the mandate}

To determine whether the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law made any changes in the list of tasks which the International Committee might have to perform as a substitute for a Protecting Power, mention must first be made of the additional tasks allotted to Protecting Powers by Protocol I. They are of two kinds.

\begin{itemize}
\item[a)] \textit{Liaison between parties to a conflict}. This includes passing on their official translations of the Protocol and of the laws and regulations adopted to ensure its application (Article 84), transmitting information on missing persons (Article 33, paragraph 3) and forwarding notifications whereby a party to a conflict claims prisoner-of-war status for persons taking part in hostilities who fall into the power of an adverse party (Article 45, paragraph 1). The Protecting Power may also be expected to act as an intermediary for the establishment of demilitarized zones (Article 60, paragraph 2).
\item[b)] \textit{Scrutiny of the application of treaty provisions}. For this purpose representatives of Protecting Powers are authorized to inspect the medical records
\end{itemize}
of any person in the hands of the adverse party who is interned, detained or otherwise deprived of liberty (Article 11, paragraph 6) and unless in exceptional circumstances are entitled to attend the proceedings of any tribunal sitting to determine whether a combatant is entitled to prisoner-of-war status (Article 45, paragraph 2). The Protecting Power may be requested to supervise the distribution of relief intended for the civilian population if the passage of relief consignments has been authorized by a party to the conflict other than the party benefiting from the relief, or by a neutral state (Article 70, paragraph 3). The Protecting Power, in agreement with the parties concerned, must supervise any evacuation of children (Article 78, paragraph 1).

The above articles of Protocol I explicitly assign responsibilities to the Protecting Powers. In addition there are several provisions, for the exchange of communications by an unspecified channel or the conclusion of agreements between the belligerents through an unspecified intermediary, which obviously come within the responsibility of the Protecting Power. They cover notification of the location of fixed medical units (Article 12, paragraph 3), notifications and agreements concerning medical aircraft (Article 29); notifications of the incorporation of paramilitary organizations into the armed forces of a party to a conflict (Article 43, paragraph 3), declarations on non-defended localities (Article 59, paragraphs 4–6), and agreements to provide objects containing dangerous forces with protection additional to that given them ipso jure by Protocol I (Article 56, paragraph 6).

These provisions obviously extend the Protecting Powers’ mandate without changing its nature. Several of them merely confirm the rules in force. It does not appear that the Diplomatic Conference also conferred on the Protecting Powers a general mandate to supervise application of Protocol I, similar to that assigned to them by common Article 8/8/8/9 to supervise application of the 1949 Geneva Conventions. Protocol I did extend the realm of humanitarian law, but a concomitant extension of the mandate of Protecting Powers cannot be taken for granted, and nothing in the Protocol grants Protecting Powers a general right of scrutiny.

The following question therefore arises: if the ICRC were accepted as a substitute for a Protecting Power in a conflict to which Protocol I applied, should it perform all the tasks which that Protocol assigns to Protecting Powers?

The ICRC does not appear to have made known its views on this point, but there would seem to be no doubt about the reply. The tasks of Protecting Powers under Protocol I are directly in line with those assigned to them by the Geneva Conventions of 1949. The International Committee has stated unequivocally that it is prepared to take on all the tasks incumbent on Protecting Powers under the Geneva Conventions. There would therefore seem to be no reason for rejecting any of those stemming from Protocol I.
To sum up, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law extended the realm of the Law of Geneva to matters that previously formed no part of it, such as restrictions on methods and means of warfare. It gave national liberation movements all the rights and obligations stipulated by the Geneva Conventions and Protocol I, although they will not find it easy to meet those obligations. But it also weakened one of the instruments of scrutiny introduced by the Conventions of 1949, although experience goes to show that augmenting the obligations imposed on parties to a conflict without also reinforcing the mechanisms for verifying observance of those obligations means that they will probably be ignored. One cannot help fearing that the Diplomatic Conference will have little practical effect; it is useless to adopt rules if there is no will to keep them.

8. A pragmatic approach?

The ICRC has never offered its services as a substitute for Protecting Powers, either before or after the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, nor to my knowledge has any other organization. Once again, hopes that the system to monitor application of the humanitarian rules would be strengthened were disappointed, but those who had taken the trouble to read Article 5, paragraph 4, of Protocol I carefully were not really surprised.

In several situations, however, the ICRC has de facto carried out the tasks that would normally be assigned to Protecting Powers, particularly those concerned with respect for the judicial guarantees to which prisoners of war and civilians protected by the Geneva Conventions are entitled. For example, for many years the ICRC delegation in Israel and the occupied territories has regularly attended the trials of Palestinian detainees from the territories. The ICRC delegation in Kuwait likewise took effective action for people brought before the courts after the liberation of Kuwait.123

In view of the apparent opposition to the appointment of Protecting Powers or of a substitute, this pragmatic approach may well be the only realistic one.

9. Concluding remarks

Few things have led to as much confusion as the institution known as a substitute for Protecting Powers. However, the original idea was perfectly simple: in case no Protecting Power had been appointed, it was to let a humanitarian organization such as the International Committee take over the humanitarian tasks normally performed by Protecting Powers, so that war victims should not lack the protection to which they are entitled under the
Geneva Conventions. There was a precedent for this idea: the ICRC’s part in
relations between the German government and the Free French government
in the Second World War.

Unfortunately the whole question has been bedevilled by the fallacy that
states would more willingly accept a substitute if more organizations were
qualified to act as such.124 Because of this fallacy, the original idea has been
embellished with proposals that had nothing to do with it, such as the French
one to form a ‘High International Committee for the Protection of Humanity’,
whose real purpose was to replace Protecting Powers by an international
organization that would supervise application of the Geneva Conventions.125
In spite of its grandiloquent title this project was completely unrealistic.

The term ‘substitute for a Protecting Power’ has accordingly been applied
to institutions that have nothing in common. Regrettably, common Article
10/10/10/11 of the 1949 Conventions shows signs of this inconsistency.

By announcing reservation after reservation against its appointment as a
substitute for Protecting Powers and failing to use the powers which para-
graph 3 of common Article 10/10/10/11 confers upon it, the International
Committee has given the impression that it did not want to act as a substi-
tute. It has consequently induced governments and other organizations
centered to look for other possibilities of substitution.

This in turn affected the deliberations of the Diplomatic Conference on the
Reaffirmation and Development of International Humanitarian Law, whose
proceedings reflect the hesitation and setbacks of previous practice. By
making conditions for appointment of a substitute as burdensome as for
appointment of Protecting Powers, the Conference may have dealt a mortal
blow to the substitution system itself.

But it is useless to bewail the past. If the substitution system is regarded as
useful, and as enabling the International Committee to give war victims
greater protection than would be possible with the duties and prerogatives
explicitly assigned to it, the only consideration is what must be done to safe-
guard that system. Surely the International Committee should face up to its
responsibilities. It can act at two levels:

a) that of official policy: the International Committee should publish a memo-
randum clearly setting out the functions it is prepared to perform as a
substitute for Protecting Powers, and on what conditions, so that the
states concerned know exactly what services they can expect from the
ICRC as a substitute, and the conditions attached;

b) that of practice: whenever the circumstances occur for which common
Article 10/10/10/11 was adopted, should not the International Committee
give favourable consideration to offering its services as a substitute for
Protecting Powers on the authority of that article? It should not allow
itself to be paralysed by sounding out the parties. As the Middle East
conflict clearly showed, such tentative approaches all too often do no
more than bring negotiations to a standstill.
Notes


3 For the mission for the protection of Russian prisoners of war in Germany in 1920–1, see ICRC Archives, files Mis 33/2, boxes 22ff. (correspondence concerning the negotiations for repatriation by land of prisoners of war not yet released) and files 33.5, vols. 1–4 (the Soviet-German negotiations). See also: RICR, no. 15, March 1920, p. 304; no. 16, April 1920, pp. 409–18; no. 17, May 1920, pp. 605–6; no. 18, June 1920, pp. 721–5; no. 19, July 1920, p. 840; no. 22, October 1920, pp. 1155–9; no. 32, August 1921, pp. 855–7; *Rapport général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, ICRC, Geneva, 1921, (hereinafter *Rapport général 1920*), pp. 111–29 and 249–50; *Rapport général du Comité international de la Croix-Rouge sur son activité de 1921 à 1923*, ICRC, Geneva, 1923 (hereinafter *Rapport général 1923*), pp. 50–1 and 77–94.


8 RICR, no. 16, April 1920, pp. 409–11.


12 The German government kept up this fiction even after France was liberated and the former Vichy Ministers were interned in Sigmaringen.

13 German and Italian prisoners of the British and American forces were under the protection of Switzerland, *ICRC Report*, vol. I, pp. 358–9.


15 Ibid., p. 359.

16 Ibid., p. 357.

17 Note from the Ministry of Foreign Affairs of the French Republic to the ICRC dated 25 November 1944, ICRC Archives, file CR 97; *ICRC Report*, vol. I, p. 214 (which says that the French request was made in the spring of 1944).


19 Ibid., pp. 359–60.

20 Ibid., p. 360.

21 Ibid., pp. 360–4.

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25 To avoid any misunderstanding, it is recalled here that the usual procedure when a Protecting Power can no longer fulfil its mandate, for example when it is itself drawn into the conflict, is to appoint a new Protecting Power. The power of origin asks another neutral state to act as Protecting Power; that state, if it consents, asks for the approval of the state (known as the host or receiving state) to which the new Protecting Power is to be accredited. Once that approval is given, the new Protecting Power takes up office. It then has all the rights and duties of a Protecting Power and cannot be called a substitute. These were the circumstances in which Switzerland took over from the United States as a Protecting Power in 1917 and 1941.

The debates leading to the adoption of common Article 10/10/10/11 addressed the completely different situation arising when for any reason the usual procedure breaks down; for example because the power of origin ceases to exist or there are no neutral states left, or the international status of one of the parties to the conflict is disputed. These were the circumstances for which a substitution procedure was introduced, and it must not otherwise be used. The usual procedure merely replaces one Protecting Power by another.


27 Draft Article 8/9/9/9, XVIth International Conference of the Red Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims, pp. 8–9, 36–7, 57 and 157.

28 XVIIe Conférence internationale de la Croix-Rouge, Sténogramme des séances de la Commission juridique (cyclostyled), pp. 73–9.

29 Draft Article 8/9/9/9, Revised and New Draft Conventions for the Protection of War Victims: Texts approved and amended by the XVIth International Red Cross Conference, pp. 11–12, 34, 55 and 116.


31 Foremost among these projects was the French proposal for a permanent international body to be known as the 'High International Committee for the Protection of Humanity' to replace Protecting Powers in the event of a world war. This proposal is reproduced in Final Record 1949, vol. III, pp. 30–1; for the minutes of the discussions, see vol. II-B, pp. 22, 61, 27, 92–3, 96–7, 118–19, 106, 34, 130–1 and 487–9; for Resolution no. 2 of the Diplomatic Conference, see vol. I, p. 361.
The designation of the protected persons is adapted to each Convention. Thus in the First Convention it reads: ‘wounded and sick, or medical personnel and chaplains’; in the Second Convention: ‘wounded, sick and shipwrecked, or medical personnel and chaplains’; in the Third Convention: ‘prisoners of war’; and in the Fourth Convention: ‘persons protected’.

For the legislative history of common Article 10/10/10/11, see the documents cited in note 23 above, p. 904.

The term ‘in default’ of a Protecting Power will often appear in the following pages. However, the blame for default of a Protecting Power does not attach to that Power itself, but to the parties to the conflict for failing to fulfil their obligation of appointing a Protecting Power to safeguard their nationals in the power of the adverse party.

The same interpretation is given in the Joint Committee’s report to the Plenary Assembly of the Diplomatic Conference of 1949, Final Record 1949, vol. II-B, p. 130.


For the content of the French proposal see the documents cited in note 31 above, pp. 904.


Paragraph 3 of common Article 10/10/10/11 does not specifically mention a third possibility that will immediately come to mind, namely for the power of origin of the protected persons to appoint the ICRC as a substitute for the Protecting Power. To do so, the power of origin would have to request the International Committee, which would then offer its services to the detaining power. Although in practice the third possibility is thus hardly distinguishable from the second, the power of origin is obviously duty bound, for as long as it is able to act, to safeguard its nationals in the hands of the adverse party by itself appointing a Protecting Power or a substitute.

The French text leads to the same conclusion: ‘… la Puissance détenteur devra demander … ou devra accepter…’ (emphasis added).

The French text is no less clear than the English text. It reads ‘… la Puissance détenteur devra demander à un organisme humanitaire, tel que le Comité international de la Croix-Rouge, d’assumer les tâches humanitaires dévolues par la présente Convention aux Puissances protectrices ou devra accepter … les offres de services émanant d’un tel organisme’ (emphasis added).

‘It was only if such protection could not be thus ensured, that the Detaining Power would have to apply to a humanitarian body such as the International Committee of the Red Cross. However, such a body could not undertake all the tasks devolving upon the Protecting Powers under the Convention, but only those of a humanitarian character.

If the Detaining Power did not, on its own initiative, apply to a humanitarian body in the circumstances envisaged, any body of this kind might offer it its services, and it might not refuse them. This latter obligation laid upon the Detaining Power was offset by the condition that the body offering its services should be able to afford sufficient guarantees of its ability to perform the duties in question and to fulfil them with impartiality.’ Final Record 1949, vol. II-B, p. 130 (emphasis added).

This attitude is reflected in the following internal policy documents, among others: D 141, ‘Memorandum sur l’activité du Comité international de la Croix-Rouge en l’absence d’une Puissance protectrice’, 1er mai 1951, p. 3; D 1165, ‘Le CICR doit-il accepter d’exercer


47 Janner, La Puissance protectrice en droit international, pp. 44–6 and 58–9.

48 ‘However, such a body [the ICRC] could not undertake all the tasks devolving upon the Protecting Powers under the Convention, but only those of a humanitarian character.’ Final Record 1949, vol. II-B, p. 130 (Report by the Joint Committee to the Plenary Assembly of the Conference).

49 Final Record 1949, vol. II-B, pp. 61 and 63 (statement by Siordet).


52 Ibid., p. 18. The ICRC uses the term ‘quasi-substitute’ to indicate the mandate that might be assigned to it under paragraph 3 of common Article 10/10/10/11. It does so to emphasize the difference between that limited mandate, covering only part of the tasks incumbent on Protecting Powers, and the mandate of a genuine substitute, which would be required to perform all the tasks incumbent on Protecting Powers under the Geneva Conventions. But the term ‘quasi-substitute’ is not used in the Conventions, and merely confuses the issue.

53 Ibid., pp. 18–20.

54 Ibid., pp. 20–4.


58 Ibid., p. 208, paragraph 5.46.


60 Official Records CDDH, vol. VIII, p. 146 (Document CDDH/ISR.17, paragraph 26).


62 For more detailed information, see the comparative table of the responsibilities of Protecting Powers and of the ICRC in Appendix II below, pp. 1044–68.

63 See Book I, Chapter VIII, Section 8 above, pp. 227–9.

64 ICRC Archives, file 280 (100).
Protecting Powers have usually asked the protected power for an advance for working expenses which is periodically reconstituted in proportion to the amounts actually disbursed; the Protecting Power undertakes to produce evidence of its expenditure. William McHenry Franklin, Protection of Foreign Interests: A Study in Diplomatic and Consular Practice, United States Government Printing Office, Washington, 1946, pp. 167–72; Janner, La Puissance protectrice en droit international, pp. 65–6.

The ICRC estimated that its entire expenditure during the Second World War was equivalent to about six hours of the total war expenditure of all the belligerents, ICRC Report, vol. I, p. 100.


It should be noted that Protecting Powers themselves have never accepted any subordination to the state whose interests they have been charged to represent, and have always reserved the right to make independent decisions on what they should do about that state’s communications and injunctions. Franklin, Protection of Foreign Interests, pp. 139 and 146–8; Janner, La Puissance protectrice en droit international, pp. 14–15.


Keesing’s Contemporary Archives, 1956, p. 15181.

At that time there were tens of thousands of Jewish and Christian stateless persons in Egypt, most of whom had to leave the country because of the Suez conflict (see Part VI, Chapter III, above, pp. 796–7.)

Telegrams of 4 December 1956, and confirmatory letters dated 11 December 1956, to the delegation in Israel and the delegation in Egypt; note no. 5 dated 12 December 1956 from the ICRC delegation in Cairo, ICRC Archives, files 202 (43), 202 (171), and 252 (43).

Note dated 19 December 1956 from the Israeli Ministry of Foreign Affairs, enclosed with note no. 86 of 23 December 1956 from the ICRC delegations in Israel, ICRC Archives, file 202 (171).

Minutes of the Presidential Council, 20 December 1956, p. 2; 21 February 1957, p. 3.

Summary of report by Mr Muller, 19 December 1956, pp. 3–4; note no. 24 from the ICRC delegation in Cairo, 19 December 1956, ICRC Archives, file 252 (43); minutes of the Committee, 10 January 1957, pp. 7–9.


Keesing’s Contemporary Archives, 1961, p. 17983.

Minutes of the meetings with Mr Asch van Wijck, Permanent Representative of the Netherlands to the International Organizations, on 15 March and 10 April 1961, ICRC Archives, Netherlands government file, no reference number.

Report by Mr Durand on his mission to Indonesia, 6–20 July 1961, ICRC Archives, file 251 (67).

Reports by Mr Vibert on his missions in Indonesia, 30 September–24 December 1961 and 13 March–5 May 1962, ICRC Archives, file 251 (67).

Minutes of the meetings with Mr Abba Schwartz of the American State Department, 17 December 1965 and 25 February 1966, ICRC Archives, file 219 (69 RDVN-47).

Minutes of the meeting with Ambassador Harriman, 6 May 1966, ICRC Archives, file 219 (69 RDVN-47).

Minutes of the Presidential Council, 18 May 1966, pp. 1–6.


91 Minutes of the plenary session of 1 and 2 December 1971, p. 4.


93 Note for the record dated 13 December 1971 + Annex; Note no. 1426 of 10 December 1971 from the ICRC delegation in Cairo + Annexes, ICRC Archives, file 202 (152).

94 Minutes of the Presidential Council, 22 June 1972, p. 4.


97 Minutes of the plenary session of 13 January 1972, p. 6. This is a particularly striking example of the way the ICRC all too often spoils its chances of being able to act by sounding out a government which at that stage incurs no responsibility for rejecting its proposals and can therefore do so with ease.


99 Note for the record, 28 December 1971, ICRC Archives, file 202 (152).


101 The setback is only partly compensated for by the ICRC’s having carried out informally in numerous conflicts many of the humanitarian tasks normally incumbent on Protecting Powers.


Emphasis added.


Article 5, paragraph 4, of Protocol I (emphasis added). For the legislative history of this provision, see the documents cited above in note 25 to Chapter I of the present Part VII, pp. 856–7.

For a substitution procedure compulsory for belligerents to be acceptable to most states, the organization(s) qualified to act as substitutes for Protecting Powers should of course be short-listed in advance. This point appears to have escaped the advocates of an automatic and compulsory substitution procedure, who did just the opposite.


This is confirmed by: Official Records CDDH, vol. VIII, pp. 271–82 (Document CDDH/I/SR.28, statements by Caron, Abi-Saab, Longya, Wielinger, Pictet, De Breucker and Bettauer), and vol. VI, pp. 75–81 (Document CDDH/SR.37, Belgium and Egypt explain their vote).

Dante, Inferno, Canto XXXI.

In its Articles 35–42 relating to methods and means of warfare and amplifying rules which until then were part of the Law of The Hague.

For the ICRC’s activities in Israel and the occupied territories, see the ICRC’s Annual Reports; for Kuwait, see Book II, Part VI, Chapter III, pp. 797–801 above; for a discussion of the ICRC’s activities in the field of judicial assistance, see Hans-Peter Gasser, ‘Respect for fundamental judicial guarantees in time of armed conflict: The part played by ICRC delegates’, IRRC, no. 287, March–April 1992, pp. 121–42.
Experience of course shows just the opposite, namely that the more organizations there are that are qualified to act as a substitute for Protecting Powers, the more uncertainty and misunderstanding there is, and the harder it is to appoint a substitute. Similarly, to have too many intermediaries between two belligerents is the surest way of never reaching an understanding.

References

PART EIGHT

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Toutes les guerres se ressemblent par l’injustice de leurs drames.
Gaston Bachelard,
Letter to Armand Lanoux,
16 October 1956
INTRODUCTION

In every war there are excesses. Some are pure accidents caused by the limited accuracy of any weapon system, or by technical failure, or by human error such as mistakes in identifying objectives. Others are due to personal initiative, over-zealous subordinates or undisciplined soldiery. Worst of all are those wilfully ordered by a high command or government, either as reprisals or in deliberate rejection of some or all of the laws and customs of war. In every war there will thus be violations of humanitarian law, many or few, serious or less serious.

The belligerent that suffers them will protest to the International Committee of the Red Cross against the iniquities of the other side. The Committee is sure to discover other violations of humanitarian law, either observed by its delegates in the course of their work or evident from the obstacles placed in their way. Obviously it cannot turn a blind eye to breaches of the humanitarian rules it has sponsored and helped to introduce into positive law. Still less can it be indifferent to the fate of the victims. It will therefore have to decide what to do, how to do it and what guidelines to follow, how to handle complaints made to it or breaches observed by its delegates, or what action to take when the rights conferred upon it by the humanitarian Conventions are flouted.

But given that the International Committee is not a party to the humanitarian Conventions, is it competent to interpret them? For if it were not, it would have to accept the interpretations of them given by the parties to the conflict. The Committee could do nothing when the rules were violated, or when a belligerent misinterpreted humanitarian law to justify its own excesses – as it doubtless would, for the ability of government officials to tailor their interpretation of the rules to suit their immediate interests is proverbial. Before trying to assess what the ICRC can do to counter violations of humanitarian law, its right to interpret that law must be ascertained.

For that purpose two related issues will be considered:

- the International Committee and interpretation of humanitarian law;
- the International Committee and violations of humanitarian law.

Such are the subjects of the following two chapters.
CHAPTER I

THE INTERNATIONAL COMMITTEE
OF THE RED CROSS AND
INTERPRETATION OF
HUMANITARIAN LAW

1. Introduction

Has the International Committee the capacity to interpret humanitarian law, and if it has, what are the effects of such interpretation?

To answer this question, the ICRC’s own standpoint has to be examined, but unfortunately it is not always consistent. The Committee has often stated that it was not competent to interpret the humanitarian Conventions, but could only give unofficial opinions.¹ In other circumstances, however, it has strongly asserted its right to interpret those very Conventions. In the case of the vessel Ophelia, for example, it wrote:

We took this opportunity of stating, once again, that our Committee was unable to verify the facts – mostly contradictory – presented by the opposing parties, and that we had to content ourselves with asserting the principles, and with giving the interpretation that appears to us to be both legally and historically correct, of the provisions of the Geneva Convention, on the basis of the facts as presented. But at the same time we insisted strongly on our independence, and reserved our right to say categorically and impartially that a certain occurrence or fact or procedure seemed to us to be contrary to the intention of the international legislators and to the letter or spirit of the international agreements of 1906 and 1907; and this we would do irrespective of whether our opinion upheld one side or the other in the argument.²

Moreover, the International Committee has in the past often given legal opinions as to the interpretation of the humanitarian Conventions, either at the request of a state or, more usually, on its own initiative.³

Yet the contradiction is apparent rather than real, for there are various forms of interpretation that differ widely in their nature and legal effects. The different forms of interpretation therefore have to be clearly distinguished one from another.
2. The various forms of interpretation

From an analytical point of view, there are four different forms of interpretation:

i) Authentic interpretation

Authentic interpretation is that of the legislators themselves, in accordance with Justinian's maxim: 'Ejus est interpretari cujus est condere' which means that the person competent to enact a legal rule is also competent to interpret it.4

When the document interpreted is an international convention, the only authentic interpretation is that on which all the contracting parties agree.5 This interpretation is explicit when it takes the form of an interpretative agreement or an exchange of notes with which all the contracting parties are associated. It is tacit when it follows from the concordant behaviour of all the contracting parties.6 The authentic interpretation given by the authors of a treaty is binding on all the contracting parties with the same force as the treaty itself.7

ii) Unilateral interpretation

Unilateral interpretation of a treaty is in the first place that of the states party to that treaty, each state being competent to interpret for its own use a treaty to which it is a party. In the national sphere, its legislative, executive or judicial organs may unilaterally interpret treaty provisions.8

By virtue of the principle of the sovereign equality of states, however, an interpretation given by one state does not bind the other contracting parties.9 But because of the principles of good faith, debarment and estoppel, the state making that interpretation may incur obligations or lose certain rights, for it cannot interpret the same provision now in one sense and now in another to suit its interests of the moment.10

Unilateral interpretation is not the exclusive prerogative of states, for it has been clearly established that international organizations are competent to interpret their constituent charter and the international agreements to which they are parties. Some constituent charters expressly assign such competence to certain organs; the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development are examples of this.11 But even where there is no specific attribution, it is clear that the implicit powers of any organization include such competence as it must have to perform its functions. This undoubtedly includes competence to interpret its constituent charter and the international agreements to which it is a party.12
In the internal working of international organizations this competence is obviously the prerogative of intergovernmental organs, which can where necessary ask the International Court of Justice for an advisory opinion. But it also belongs, within the limits of their particular duties, to their secretariats, which could not do their work unless they were competent to interpret the regulations governing the tasks assigned to them.

An international organization is bound by the interpretation it gives to a treaty. That interpretation may be mandatory on member states if the constituent charter so requires or alternatively if all the member states subscribe to it, in which case it is no longer a unilateral interpretation but an authentic one.

Like an authentic interpretation, a unilateral interpretation may be either explicit, in which case it takes the form of a declaration or statement of policy, or implicit, in which case it follows from conclusive conduct by the legal entity concerned.

iii) Interpretation by arbitral tribunal or international courts

Unilateral interpretation of a treaty provision often gives rise to international disputes in which each party upholds the interpretation that best serves its interests. When diplomatic means such as negotiation, conciliation, good offices or mediation fail, the only way to reach a uniform interpretation is to submit the dispute to an arbitral tribunal or an international court.

Interpretation of treaties is a normal function of international courts and tribunals. But in virtue of the principle that no state may be judged without its consent, interpretation by arbitration or judicial settlement is possible only if the parties agree to submit their dispute to an international court.

In principle, interpretation by arbitration or judicial settlement has no binding force except between the parties to the case and in respect of that particular case.

iv) Doctrinal interpretation

Doctrinal interpretation is interpretation by writers and learned societies. It may well be of great theoretical interest, but ‘since it does not deal with any actual application of the treaties’ it is not legally binding on the contracting parties. However, when the most highly qualified publicists of the various nations agree on the interpretation of a provision, their opinion can be accepted as a subsidiary means of interpreting that provision.

3. Competence of the ICRC

The preliminary question as to whether the International Committee has the capacity to interpret humanitarian law can now be considered.
It cannot be acknowledged that the international community has assigned certain tasks and prerogatives to the ICRC without also deeming it to have the capacity to interpret its own rights and obligations, otherwise it could not possibly discharge its responsibilities. How could the International Committee collate and transmit lists of captives, visit camps for prisoners of war and civilian internees, carry out relief operations and repatriate prisoners if it were not qualified to interpret the relevant rules? Article 3 of the Geneva Conventions recognizes that the ICRC is entitled to offer its services in a non-international armed conflict. How could it do so if it did not have the capacity to interpret that article?

In fact, the ICRC has constantly interpreted the Conventions, both to orient its own activities and in its correspondence with the parties to a conflict, and no government has validly disputed its right to do so.

But is the ICRC competent to interpret only the rules relating to its own activities, or other rules of humanitarian law as well?

To answer that question, the practice of the ICRC and of states in their relations with it must be examined. It will be seen that the International Committee has regularly interpreted provisions of humanitarian law other than those directly related to the tasks entrusted to it; examples are its condemnation of the torpedoing of hospital ships and the use of poison gas, and its statements on the marking of civilian hospitals. The states concerned have often stigmatized ICRC pronouncements as inopportune or inaccurate, but they have never seriously contested its right to make them. Also, states have often voluntarily asked the International Committee how to interpret such and such a provision of the Conventions.

Moreover, in every conflict since the ICRC came into being, all the belligerents have submitted protests to it concerning alleged violations of humanitarian law, not only of the Geneva Conventions but also of other rules of the law of war, such as those forbidding the use of chemical or bacteriological weapons or indiscriminate aerial bombardment. Obviously the ICRC could not have taken cognizance of their protests had it not been entitled to interpret the rules allegedly violated.

This entitlement is confirmed by Article 5.2c) of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross at Geneva in October 1986. This states that the role of the International Committee is, among other things, ‘to take cognizance of any complaints based on alleged breaches of international humanitarian law applicable in armed conflicts.’

There is therefore no doubt that the International Committee has the capacity to interpret humanitarian law, both because of its responsibilities in applying it and because of ICRC practice and the practice of states in their relations with it. That capacity is confirmed by the Statutes of the International Red Cross and Red Crescent Movement.
4. Forms of interpretation open to the ICRC

It has already been pointed out that authentic interpretation and unilateral interpretation may be either explicit or tacit. The same applies to interpretation by the ICRC.

Its interpretation is explicit when it sets forth what it believes to be the correct interpretation of the humanitarian Conventions, either in diplomatic notes or circulars sent to all the belligerents or all the states party to the Geneva Conventions, or at an International Conference of the Red Cross and Red Crescent or a Diplomatic Conference.

It is tacit when it transpires from sufficiently conclusive conduct, a form of interpretation more difficult to define, but perhaps the most important one in the case of the ICRC. Indeed, the ICRC’s part in consolidating humanitarian law and sometimes making it more effective has been largely due to its consistent practice of interpreting the Conventions extensively, and to states’ acceptance of that practice.

Much of the ICRC’s practice could be mentioned here, but a single example will suffice: that of Red Cross sea transport in the Second World War. The Hague Convention (X) of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention restricted the use at sea of the red cross emblem to hospital ships. But with the belligerents’ consent the ICRC used the emblem to identify ships it had chartered to transport relief supplies for prisoners of war and civilian internees, Swedish vessels used for the relief operation in Greece, and some ships used to repatriate seriously wounded personnel or for the exchange of prisoners of war and of civilian internees. The Diplomatic Conference of 1949 confirmed this extension of the use of the red cross emblem.

5. The effects of the ICRC’s interpretation of humanitarian law

Obviously, the International Committee’s interpretation of the humanitarian Conventions cannot be regarded as an authentic one, for only a concordant interpretation by all the contracting parties can be classed as authentic. Nor can it be regarded as equivalent to an interpretation by an arbitral tribunal or an international court, because arbitral or jurisdictional capacity always depends on the parties to the dispute recognizing the arbitrator or tribunal as competent to adjudicate their dispute. Such competence can never be taken for granted. Neither is the ICRC’s interpretation a doctrinal one, for because of its responsibilities in applying the humanitarian Conventions and its recognized powers for that purpose, it cannot be equated with a private individual or a learned society.
Its interpretation is therefore a unilateral one, by an institution having a special legal personality because of the functions assigned to it by the international community.

The ICRC’s main purpose of interpretation is to guide its activities and its approaches to the parties to a conflict. Belligerent and neutral states are not bound by it, but they cannot altogether ignore it, for it comes from an impartial humanitarian institution endowed with responsibilities in applying the humanitarian Conventions. Undoubtedly, therefore, it is a reference point that states have to take into account and examine in good faith.

As an independent body, the ICRC can express impartial opinions that narrow the gap between parties to a conflict and may help to smooth differences as to the interpretation and application of international humanitarian law. The Geneva Conventions have recognized this, since they provide for the possibility of inviting an ICRC delegate to take part in the conciliation procedure recommended by common Article 11/11/11/12.

It cannot be assumed that states have through their consistent practice recognized the International Committee as competent to interpret the humanitarian Conventions, while themselves being entitled to dismiss its interpretation as worthless. Such a conclusion would be totally inadmissible.

In other words, although states are not bound by the ICRC’s interpretation they must examine it in good faith. There would otherwise be no point in recognizing the ICRC as competent to interpret the Conventions.

International practice confirms these conclusions; it shows that, far from going unnoticed, ICRC opinions often influence government policy.

Notes

1 For example, in its report to the Seventh International Conference of the Red Cross the ICRC states that it can express only ‘unofficial opinions’, Septième Conférence internationale de la Croix-Rouge, tenue à Saint-Petersbourg du 16 au 22 mai 1902, Compte rendu, p. 159. Again, in January 1945 the ICRC declared, on the subject of repatriation of staff administering medical units, that: ‘the International Committee of the Red Cross is of course not qualified to give an official interpretation of the provisions of an international Convention, but has expressed the following personal opinion …’, Revue internationale de la Croix-Rouge (RICR), no. 313, January 1945, p. 1. It adopted a similar position in RICR, no. 299, November 1943, p. 849; no. 300, December 1943, p. 937, and so on. The International Committee has even been so diffident as to affirm that only states can interpret the Geneva Conventions (Annual Report 1957, p. 34).


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ambulance in China and Articles 10 and 11 of the Geneva Convention relating to wounded
and sick), a legal opinion summarized in RICR, no. 275, November 1941, pp. 857–9;
‘Protection des hôpitaux civils’ (Protection of civilian hospitals), a legal opinion reproduced
in RICR, no. 281, May 1942, pp. 297–301; ‘Signalisation des hôpitaux civils’ (The marking
of civilian hospitals), a legal opinion summarized in RICR, no. 289, January 1943, pp. 11–15;
‘Application de la Convention de Genève – Le personnel sanitaire perd-il le droit à
l’immunité s’il est armé?’ (Application of the Geneva Convention – Do medical personnel
lose their right to immunity if they are armed?), a legal opinion summarized in RICR, no. 294,
June 1943, pp. 424–8; ‘Prisonniers de guerre victimes d’accidents du travail’ (Prisoners
of war injured at work), a legal opinion reproduced in RICR, no. 299, November 1943,
pp. 849–53; ‘Le problème de l’homme de confiance dans les camps d’officiers’ (The problem
of prisoners’ representatives in officers’ camps), a legal opinion reproduced in RICR,
no. 299, November 1943, pp. 853–5; ‘Signalisation des hôpitaux civils, emploi du signe de
la croix-rouge’ (The marking of civilian hospitals and use of the red cross emblem), a legal
opinion reproduced in RICR, no. 300, December 1943, pp. 937–43; ‘Emploi du signe de la
croix-rouge sur des navires’ (Use of the red cross emblem on ships), a legal opinion repro-
duced in RICR, no. 305, May 1944, pp. 355–60; ‘Solde des officiers prisonniers’ (Pay of
POW officers), a legal opinion summarized in RICR, no. 305, May 1944, pp. 353–5;
‘Situation des membres de la marine marchande capturés’ (Status of captured merchant
seamen), a legal opinion reproduced in RICR, no. 306, June 1944, pp. 434–9; ‘Emploi de
bombes à retardement’ (The use of time bombs), a legal opinion reproduced in RICR, no.
309, September 1944, p. 675; ‘Rapatriement du personnel affecté à l’administration des for-
mations sanitaires’ (Repatriation of personnel administering medical units), a legal opinion
reproduced in RICR, no. 313, January 1945, pp. 1–4.

Mention should also be made of various policy statements on the interpretation of the
humanitarian Conventions, to be found in the Report of the International Committee of the
Red Cross on its Activities during the Second World War (September 1, 1939–June 30,
1947), vol. I, General Activities, ICRC, Geneva, May 1948, on the following matters: treat-
ment of retained medical personnel (pp. 207–9); use of the distinctive emblem for the pro-
tection of civilian hospitals (pp. 209–11); interpretation of the 1907 Hague Convention (X)
for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention
(pp. 213–15); employment of prisoners of war on anti-aircraft defence (p. 313); employment
of prisoners of war on prohibited, unhealthy or dangerous work, including clearing
minefields (pp. 332–5); responsibility of the capturing power for the care of prisoners of war
transferred to another power (p. 336); treatment of prisoners of war prosecuted or sen-
tenced for war crimes (pp. 361–2); repatriation of prisoners of war after the close of hos-
tilities (pp. 394–403); status of partisans (pp. 516–19); status of ‘Surrendered Enemy
Personnel’ (pp. 539–43); transfers of prisoners from one detaining power to another
(pp. 543–5); prisoners of war ‘transformed’ into civilian workers (pp. 546–51); etc.

5 Paul Guggenheim, Traité de Droit international public, vol. I, second edition, Librairie
Georg & Cie, Geneva, 1967, p. 248, note 1; Rousseau, Droit international public,
pp. 242–3.
6 Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties of 23 May 1969;
7 Ibid., Droit international public, pp. 246–7.
8 Ibid., pp. 250–66.
9 Ibid., pp. 250–1.
11 Article XVIII of the Agreement on the International Monetary Fund and Article IX of the
Agreement on the World Bank, signed at Washington on 27 December 1945 (the ‘Bretton
12 ‘Under international law, the Organization must be deemed to have those powers which,
though not expressly provided in the Charter, are conferred upon it by necessary implication
as being essential to the performance of its duties’, International Court of Justice, Reparation
for injuries suffered in the service of the United Nations, Advisory opinion of 11 April 1949,

14 For example, the United Nations Secretariat could hardly register treaties if it were not competent to interpret Article 102 of the Charter (see the Note by the Secretariat reproduced in the *United Nations Treaty Series*, vol. 1, pp. xv-xix).

15 Article 38 of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907; Article 13, paragraph 2, of the Covenant of the League of Nations; Article 36 of the Statute of the International Court of Justice.


17 Articles 37 and 84 of the Hague Convention for the Pacific Settlement of International Disputes; Article 94 of the Charter of the United Nations; Article 59 of the Statute of the International Court of Justice.

18 Translation of ‘intervenant en dehors de toute application concrète des traités’ (phrase used by Rousseau, *Droit international public*, p. 241).

19 Article 38.1 (d) of the Statute of the International Court of Justice.

20 See note 3 above (pp. 920–1).

21 See, for example, the legal opinion on the interpretation of Article 2 of the Convention of 1864, given at the request of the British government, *Bulletin international*, no. 100, October 1894, pp. 235–6.


24 First Convention, Article 44, paragraph 3; Second Convention, Article 44.

References

There is not, to my knowledge, any study dealing with this subject.
CHAPTER II

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND VIOLATIONS OF HUMANITARIAN LAW

Violence breeds violence.
Aeschylus, Agamemnon, lines 763ff.

1. Introduction

Of all the problems facing the ICRC, the most sensitive is certainly what it should do about violations of humanitarian law.

The ICRC cannot presume to judge the conduct of belligerents, and still less censure it, without compromising its ability to help war victims. But it cannot jettison the humanitarian rules it has called for, welcomed, and helped to fashion, nor close its eyes to the suffering caused by every violation of humanitarian law.

Its policy towards alleged violations of humanitarian law is thus circumscribed by two equally strong but contradictory imperatives. No wonder, then, that no other question has more constantly weighed on its mind, that it has found no immediately applicable answer, and that after more than a century’s doctrinal study the ICRC still treads as warily here as a mountaineer on a ridge with a sheer drop on either side.

Before trying to follow the International Committee on this arduous and narrow path mention should be made of the provisions of the Conventions that apply to violations of humanitarian law, for it is those provisions that must direct ICRC policy.

2. The legal bases

The fundamental provision to which all others are subject is Article 1 of the Geneva Conventions of 12 August 1949: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’

This opening provision of the Geneva Conventions underscores their obligatory nature. They are not mere contracts for an exchange of services,
binding on each party only in so far as the other party duly observes them, but solemn undertakings by each state vis-à-vis itself and all the other signatory states to recognize a higher law, one that responds to an essential requirement of humanity.2

The obligation to respect the Geneva Conventions is binding upon the state as a legal entity, and upon all its organs and agents, civilian or military.3 This obligation may be interpreted in either of two ways:

a) it may mean that each contracting party must ensure that all persons over whom it has authority respect the Geneva Conventions;4 or
b) it may mean that each contracting party must ensure that the Conventions are universally respected.5

The preparatory work for the Conventions does not enable either interpretation to be unreservedly chosen or rejected. Both were put forward at the Diplomatic Conference of 1949, which did not find it necessary to decide between them.

Whichever way the obligation to ensure respect for the Geneva Conventions is to be interpreted,6 there are two conclusions on which disagreement is impossible:

a) Any contracting state must ensure that not only its agents respect the Geneva Conventions, but also that every person placed under its control does so. Even if a treaty contains no specific provision to that effect, every state must see to it that private individuals under its jurisdiction do not contravene its international obligations. This is a matter of common sense and good faith. It does not mean that the state’s international obligations are equally binding on individuals, but that the state must show due diligence and use every means in its power to prevent individuals under its jurisdiction from infringing its obligations.7

b) Whenever a violation is committed of any treaty such as the Geneva or Hague Conventions any state party to that treaty is entitled to demand that it be respected, even if none of its nationals is directly harmed by the violation.

Indeed, any substantial breach of a treaty of that kind weakens its authority and violates the rights of all co-signatories to it, whether or not they are directly prejudiced thereby.8

Are states not only entitled, but also duty bound, to intervene when a serious violation of humanitarian law occurs? On several occasions the ICRC has asked all states party to the Geneva Conventions to approach belligerents and demand respect for those treaties, citing the solemn undertaking in Article 1 thereof in support of its request. There is nothing in the preparatory work that clearly supports this interpretation, but nothing to rule it out either.9
Every state which is party to the Geneva Conventions must therefore take all appropriate steps to ensure that the Conventions are properly applied by all its agents and respected by the population, and must consequently adopt the legislative, administrative and regulatory measures required for that purpose. This is a general obligation, binding even if it is not specifically stated. In the words of the Permanent Court of International Justice,

... a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.\(^{10}\)

The Geneva Conventions do, however, expressly provide for such measures. Contracting states must in particular enact penal legislation to prevent and repress breaches of those treaties, as laid down in paragraph 1 of common Article 49/50/129/146:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Article 80, paragraph 1, of Protocol I states that ‘The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol’. This provision is undoubtedly intended above all to ensure that suitable laws and regulations are enacted.\(^ {11}\)

However, if the people who have to respect the Geneva Conventions and their Additional Protocols have no knowledge of them all these precautions will be in vain. The contracting parties must therefore take care, both in peacetime and in time of war, to make the text of the Conventions and Protocols as widely known as possible.\(^ {12}\) They will for example have to include them in their military training programmes and encourage the civilian population to study them, so that both the armed forces and the general public know them well.\(^ {13}\) Besides this, any civilian or military authority which would be responsible in wartime for prisoners of war protected by the Third Convention, or for civilians protected by the Fourth Convention, must have a copy of the appropriate Convention and be specially trained to apply it.\(^ {14}\)

There will nevertheless still be violations of humanitarian law, as in every past war. Any of the following acts committed against persons or property protected by the Geneva Conventions or Protocol I will be considered grave breaches:

- wilful killing, torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- compelling prisoners of war, or civilians protected by the Fourth Convention, to serve in the armed forces of a hostile power;
depriving prisoners of war or protected civilians of their right to fair trial; hostage-taking;

- deliberate attacks on the civilian population;

- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

- the perfidious use of the red cross or red crescent emblem.

This list is not exhaustive.\textsuperscript{15}

Under paragraph 2 of common Article 49/50/129/146 of the Geneva Conventions, each contracting party is under the obligation to search for persons alleged to have committed, or to have ordered to be committed, a grave breach, and must bring such persons, regardless of their nationality, before its own courts. It may also hand such persons over for trial to another contracting party wishing to prosecute them.\textsuperscript{16}

In other words, every contracting party is obliged to open an enquiry into any grave breach said to have been committed by a person in its power or under its jurisdiction. If it is established that such a breach has been committed, that party is obliged to repress it or give legal assistance for that purpose. It must also take any necessary steps to put an end to all acts contrary to the provisions of the Geneva Conventions or the Protocols additional thereto, whether such acts are grave breaches or not.\textsuperscript{17}

Even where there is no reason to believe that a violation of the Geneva Conventions has taken place, every power detaining prisoners of war is obliged to make an official enquiry whenever a prisoner is killed or wounded, by a sentry, another prisoner of war or any other person, or any death of unknown cause occurs. Article 121 of the Third Convention stipulates that:

\begin{quote}
Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.
\end{quote}

Article 131 of the Fourth Convention lays down identical rules in respect of civilian internees killed or wounded in such circumstances.

Thus the Geneva Conventions and Additional Protocol I impose an obligation upon the contracting parties to take definite steps to prevent and repress violations of those treaties. However these steps, which must be taken by each contracting party, will not always prevent parties to a conflict from disputing the issue. They might contest:

- either a point of law, namely the category in which certain acts are classified, and hence the interpretation of the humanitarian rules; or
a point of fact, namely whether the acts complained of did indeed take place.

The international community is a decentralized society made up of sovereign states possessing equal rights, and there is at present no body empowered to give an interpretation of humanitarian law that would *ipso jure* command the acceptance of parties to conflicts. Each state is entitled to interpret the rules concerning it. Any divergence of opinion must be resolved by the parties to conflict themselves. Neutral states or organizations, and in particular the Protecting Powers, can only use their good offices to bring the parties together and enable them to come to an agreement as to the interpretation of the Conventions. Common Article 11/11/11/12 makes this clear as follows:

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for [the protected persons] possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Yet the practical effect of this provision should not be overestimated. Whereas negotiations under neutral auspices did indeed take place between belligerent states during the First World War – though without direct contact between the delegations of the warring powers, who refused to meet each other and held their deliberations in separate rooms, with neutral delegates acting as go-betweens – there were apparently no such sessions either in the Second World War or in subsequent conflicts.

At the 1949 Diplomatic Conference some delegations therefore proposed that the contracting parties should undertake to recognize the International Court of Justice as competent *ipso jure* to deal with any question concerning the interpretation or application of the Geneva Conventions. The proposal was strongly opposed by several delegations, especially the Soviet delegation, and was accordingly dropped. The Conference confined itself to a mere recommendation, which was inserted in the Final Act as follows:

The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice.

Often, however, the dispute will not be on a point of law but on the facts of the case, one party denying the other party’s allegations. It then becomes necessary to establish whether the disputed incidents actually occurred.
The Conventions of 1864 and 1906 say nothing about means of resolving a dispute of this kind, but the Diplomatic Conference of 1929 decided to set up commissions of enquiry to establish whether alleged violations of the Geneva Conventions had in fact taken place. Article 30 of the Convention of 27 July 1929 accordingly reads:

On the request of a belligerent an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.24

This provision was hailed as ‘a great step forward and a real new guarantee that the Convention will be strictly applied’.25

This hope was disappointed, and the responsibility for this lies fairly and squarely with the text adopted, for although Article 30 states in peremptory terms that on the request of a belligerent an enquiry shall be instituted, it leaves it to the parties to the conflict to agree among themselves on the procedure for the enquiry. Nothing is less likely than an agreement between two states that are at each others’ throats, and predictably, the provision was never applied during the Second World War.26

In the draft Conventions submitted to the Seventeenth International Conference of the Red Cross, meeting in Stockholm in August 1948, the International Committee therefore put forward a completely new enquiry procedure. It proposed that commissions of enquiry comprising three neutral members should be instituted, the plaintiff party and the defendant party each appointing one member of the commission. The third member would be designated by the other two, and should they disagree, by the President of the International Court of Justice, or should the latter be a national of a belligerent state, by the President of the ICRC.27

The proposal was approved by the Stockholm Conference, which merely refined a detail of the text.28 The Diplomatic Conference of 1949, however, decided almost without discussion to revert to the 1929 provision, claiming that the proposed method of recruiting the commission of enquiry was too complicated.29 The result was common Article 52/53/132/149 of the 1949 Conventions:

At the request of a Party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

This proposal shares the weak points of its predecessor in that it, too, leaves the parties to a conflict to agree on the formation of the commission of enquiry, or to choose an umpire who will decide on the procedure to be
followed. Consequently, one of the parties has only to refuse its consent and the enquiry procedure grinds to a halt. Indeed, this article has never led to any tangible result.\textsuperscript{30}

There being no independent impartial fact-finding procedure, when the parties to the conflict accused each other of violations of humanitarian law, as they did on innumerable occasions, it was impossible to investigate their allegations and ascertain whether violations had indeed taken place. This exposed the shortcomings of the procedure for the settlement of disputes which was introduced by the 1949 Conventions.

The question of establishing an enquiry procedure that did not depend on agreement between the parties was again raised at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–77). Two proposals for a mandatory procedure were put before the Conference, one by the Pakistan delegation and the other by the delegations of Denmark, Sweden, Norway and New Zealand. The two projects differed from each other in the procedure proposed, but agreed on the essential point, namely the need to set up a permanent commission of enquiry which would have the right and the duty, on the basis of a unilateral request, to institute an investigation.\textsuperscript{31} In support of both proposals it was argued that they would make humanitarian law more effective and that the dissuasive effect of a compulsory procedure for ascertaining the facts would suffice to prevent many breaches.\textsuperscript{32}

These proposals aroused a storm of protest from the delegations of the socialist states and some Third World countries, notably India and Indonesia. It was even asserted that a permanent commission of enquiry would amount to a derogation from the sovereignty of states and to interference in their internal affairs!\textsuperscript{33}

So virulent was the opposition to the proposals that the Conference adopted a less ambitious procedure modelled on the optional clause, contained in Article 36, paragraph 2, of the Statute of the International Court of Justice, for recognizing the latter’s jurisdiction as compulsory.

Article 90 of Protocol I, which sets out the procedure adopted, accordingly provides for the establishment of an International Fact-Finding Commission of fifteen members of high moral standing and acknowledged impartiality. Its dual mandate is to enquire into any facts alleged to be a grave breach as defined in the Conventions and Protocol I, and to facilitate through its good offices the restoration of an attitude of respect for the Conventions and that Protocol. It will operate with the consent of the parties to the conflict concerned, but states may if they wish declare that they recognize \textit{ipso facto} and without special agreement, in relation to any other state accepting the same obligation, its competence as binding. Thus Article 90, paragraph 2, reads:

(a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize \textit{ipso facto} and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the
Commission to enquire into allegations by such other Party, as authorized by this Article.

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

Article 90 further stipulated that the Commission was to be formed when not less than twenty high contracting parties had agreed to accept its competence as binding, and that only states having made the declaration pursuant to paragraph 2 could elect the members of the Commission, but must ensure that there is equitable geographical representation in the Commission as a whole.34

With regard to requests for an enquiry, two situations may arise.

- Either the Commission’s competence has been recognized, in accordance with Article 90, paragraph 2, of Protocol I, both by the party alleging that a grave breach has been committed and by the party accused thereof, in which case the Commission may institute an enquiry on the basis of a unilateral request; or
- These conditions are not fulfilled, in which case the Commission may institute an enquiry at the request of a party to a conflict only with the consent of the other party or parties concerned.35

This ingenious scheme was perhaps the only way to break the deadlock between the states pressing for a compulsory enquiry procedure and the states that flatly refused to countenance any such thing. It strictly observes the principle of balanced rights and duties for all parties, and provides for the formation of a restricted treaty-based community of states that recognize the Commission’s compulsory competence in advance. Each state is free to enter that community by accepting the rights and duties of its members. It is no less free to stay outside it. The declaration provided for in Article 90, paragraph 2, of Protocol I is purely optional, but its effects are binding on the state making it and on all states that have previously made it.

The concept has meanwhile become a reality. By the end of 1990, twenty states had made the unilateral declaration provided for in Article 90, paragraph 2, of Protocol I, so Switzerland, acting in its capacity as depositary of the Geneva Conventions, invited them to attend a special conference in order to elect the Commission’s fifteen members. This election took place on 25 June 1991,36 and since then the Commission has been at the service of belligerents.

There has, however, been no rush to use this new procedure. At 31 December 1998, 188 states were party to the Geneva Conventions and 152 to Protocol I, but only fifty-three states had made the declaration mentioned in Article 90, paragraph 2.37 So far, none has ever called on the Commission’s services.

Evidently, the great majority of states are not ready to recognize in advance, as binding on them, the competence of a body entitled to investigate their alleged failings.
These conclusions cut down to size critics who blame the International Committee for not setting itself up as a commission of enquiry into violations of humanitarian law. They want the ICRC to conduct an investigation – but only into the misdeeds of others! Whether it likes it or not, when the ICRC has to adopt a line of conduct on alleged violations of humanitarian law it cannot disregard these conclusions, least of all the gut reaction of the overwhelming majority of states against any compulsory procedure of enquiry.

However, before considering ICRC practice with regard to alleged violations of international humanitarian law, it would be as well to set out the relevant rules applicable in non-international armed conflicts.

Neither Article 3 of the 1949 Conventions nor Protocol II contain any provision on alleged violations of those instruments. Apart from the customary rules limiting the use of reprisals, the only treaty provisions immediately applicable are paragraphs 2 and 3 of common Article 3, which read:

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

There is, a priori, nothing to stop the parties to a conflict from concluding special agreements to implement the procedure for the settlement of disputes set out in common Articles 11/11/11/12 and 52/53/132/149 of the Geneva Conventions. In practice, however, applying these articles will raise even more difficulties in internal conflicts than in international ones. This means that the ICRC will have to decide for itself how to treat violations of humanitarian law committed in non-international armed conflicts, for humanitarian law is silent on the subject.

3. ICRC practice

All the International Committee’s activities are aimed at perfecting and implementing humanitarian law and helping to ensure that it is respected, or in the widest sense at preventing violations of it, limiting their effects on war victims when they occur, and facilitating the return to compliance with humanitarian law.

The whole range of activities reviewed in the previous chapters (representations to protect war victims against the effects of hostilities, tracing activities, visits to places of detention, protection of aliens in the territory of a party to conflict and of the civilian population in occupied territory, relief operations and repatriations) may therefore be regarded as a response to actual or potential violations of humanitarian law and as a kind of continuous surveillance for preventive purposes.
But it still remains to identify, if possible, the various ways in which the International Committee can react to violations that have already occurred or follow up the complaints made to it. What can the ICRC actually do when a violation of humanitarian law is committed?

First of all, it negotiates. It notifies the accused party of acts or omissions that might constitute violations of international humanitarian law, and tries to persuade that party to put a stop to them and resume strict compliance with the rules. The form and content of the ICRC’s notifications will depend on how serious the alleged violations are, and so may range from an oral remark, made by a delegate to his usual official contacts, to a top-level approach in the form of a diplomatic note or special mission by the President of the ICRC to the government concerned.

As a rule the ICRC conducts such negotiations with its usual discretion; not because it has a predilection for secrecy, but because it has found a confidential approach infinitely more likely than a public outcry to halt a violation of humanitarian law. States publicly accused of such violations are usually more anxious to justify themselves than to make amends for them (which could be construed as an admission of guilt), and as everyone knows they are never at a loss for excuses. Public protests have all too often been counter-productive. Feeling itself to be in the dock, the accused state has hardened its attitude and persisted in the acts ascribed to it, so as to show the world it had nothing to be ashamed of. It was the victims who paid the price.

In many cases, however, representations to a single belligerent will not end violations of humanitarian law, for example where both sides are guilty of the same violation or where the violations are fairly evenly balanced, so that in order to avoid facing up to its obligations each party to the conflict accuses the other of violations it is itself committing. One of the most frequent examples is the retention, contrary to Article 30 of the First Convention or Articles 109 and 110 of the Third Convention, of war invalids or of medical personnel not needed to provide assistance to their fellow prisoners of war: each belligerent uses its adversary’s failure to release prisoners as an excuse for not freeing its own prisoners. Only diplomatic dialogue with both belligerents will break the vicious circle of reprisals and persuade them to observe the Conventions again. To this effect, negotiations must go hand in hand with mediation or conciliation.

Violations of humanitarian law may also lead the ICRC to step up its aid in order to alleviate their consequences. It may, for example, decide to launch a relief operation for prisoners who lack food or other essentials, or are not receiving the medical care their condition requires. It may also register prisoners or transmit family messages if the detaining authority fails to do so, and will certainly visit places of detention more frequently if it receives reports of brutal treatment there.

While operations like these are often vital in emergencies, the ICRC must beware of engaging in longer-term relief activities whose sole effect is to mitigate – to an inevitably limited extent – the effects of violations it cannot
prevent. Similarly, it must beware of distracting from or appearing to coun-
ernance violations by mounting a relief operation which, though doubtless
beneficial, can never serve as a substitute for compliance with the law.

For however useful an operation to alleviate the suffering caused by a vi-
olation of humanitarian law may be, the ICRC still has to decide what stance
to take once that violation is recognized as such. It cannot merely bind up
wounds, turning a blind eye to the excesses and brutalities that caused them.
Nor can its relief operations dispense it from deciding how to follow up com-
plaints submitted to it.

This question arose as early as the Franco-Prussian War of 1870, the first
conflict between states party to the brand-new Geneva Convention.

The 1864 Convention did not, of course, state what action should be taken
on complaints of violations of its provisions, but Article 10 of the
Resolutions of the Constituent Conference of October 1863 directed that:
'The exchange of communications between the Committees of the various
countries shall be made for the time being through the intermediary of the
Geneva Committee.' As the Conference did not provide for any permanent
body to take over the functions temporarily assigned to the Geneva
Committee, these inevitably became permanent ones. A neutral intermediary
was indeed essential in case of conflict, for once relations were broken off
there was no direct communication between the belligerents’ national
committees.

Thus, shortly after the start of the Franco-Prussian War the International
Committee found itself being used by the Berlin and Paris Committees as a
channel for their correspondence with each other. And naturally it also
received complaints of alleged violations of the Geneva Convention from the
Central Committees of both belligerents.

While firmly pointing out that it was not qualified to investigate the bel-
ligerents’ conduct, the International Committee agreed to pass on the com-
plaints to the Central Committee of the accused party. In so doing it stressed
that it was not for it to decide whether the complaints were justified and
asked that the allegations be thoroughly investigated, since the ‘honour of
the Geneva Convention’ was so seriously at stake; it also undertook to
forward the accused party’s reply. It has followed the same procedure in all
subsequent conflicts.

This practice is confirmed by the Statutes of the International Red Cross, as
adopted by the Thirteenth International Conference of the Red Cross (The
Hague, 1928) and revised by the Eighteenth Conference (Toronto, 1952) and
the Twenty-fifth Conference (Geneva, 1986). Article 5.2c) of the Statutes of
the International Red Cross and Red Crescent Movement states that the role
of the International Committee is, among other things,

to undertake the tasks incumbent upon it under the Geneva Conventions, to work
for the faithful application of international humanitarian law applicable in armed
conflicts and to take cognizance of any complaints based on alleged breaches of
that law.
The ICRC’s Report on its Activities during the Second World War gives useful information on how it carried out this task. It transmitted complaints from a National Red Cross or Red Crescent Society to the National Society of the accused country, forwarding the original text or at least giving the gist of it, and when it saw fit emphasizing the seriousness of the accusations and asking to be enabled to reply to the adverse party. National Societies sometimes asked the ICRC to make their protests known to all National Societies or even to world opinion, but the ICRC felt that it could not itself pronounce on the merits of facts which it was not in a position to verify by investigation and therefore could not accede to their request.

Protests of this kind from a government were transmitted directly to the government of the accused state.

However, this procedure could serve a useful purpose only if the National Societies exercised their influence with their governments to bring about an objective examination of the facts of the case, and if the latter agreed to conduct such an enquiry. The ICRC found that the outcome was usually disappointing; only the American Red Cross was able to provide it with detailed replies from its government.45

The International Committee therefore decided to ask the Seventeenth International Conference of the Red Cross (Stockholm, August 1948) whether to continue transmitting protests from National Societies; it pointed out that such action should not run the risk of endangering its humanitarian activities, and was futile unless National Societies made every effort to submit each protest to exhaustive and impartial investigation and subsequently sent it a detailed reply.46

The Conference was of the opinion that the International Committee should continue to transmit protests of this kind. In the words of Resolution XXII:

The XVIIth International Red Cross Conference, considers that the International Committee of the Red Cross should continue to transmit protests it may receive concerning alleged violations of the Conventions, emphasizes the duty of National Societies to forward these protests to their Governments, recommends that National Societies do all in their power to ensure that their Governments make a thorough investigation, the results of which shall be communicated without delay to the International Committee of the Red Cross.47

In spite of this resolution the International Committee found that it was asked to pass on a steadily increasing number of protests, but that its communication of them was as vain and useless as ever and was moreover generally ill-received by the accused party. The Committee therefore proposed to cease transmitting them except in the absence of any other regular channel, where a neutral intermediary was necessary between the parties directly concerned.48 The Twentieth International Conference of the Red Cross, meeting
in Vienna in October 1965, accepted this proposal and adopted the following resolution:

The XXth International Conference of the Red Cross,

after examining the Report submitted by the International Committee of the Red Cross on protests regarding alleged violations of the humanitarian Conventions,

whereas the aim in transmitting such protests to an accused party is that a full enquiry should be opened and a detailed report made,

considering that this procedure has never yielded any concrete results,

takes note that the ICRC will no longer transmit such protests, except in the absence of any other regular channel, where there is need of a neutral intermediary between two countries directly concerned.\textsuperscript{49}

In theory, this means that the ICRC is no longer required to transmit either of the third-party protests, for they can be sent direct to the parties concerned, or protests from a warring party’s National Society if they have been leaked to the media, for its services as an intermediary are no longer needed to make them known to the adverse party. On the other hand, it is still required to transmit complaints from a warring party’s National Society if they have not been made public. The Vienna resolution therefore relieved the ICRC of a number of minor tasks, but not of the responsibilities it had been assuming for nearly a century.

In practice, the ICRC has continued to transmit complaints from the National Societies of belligerent states, as it has always done since the Franco-Prussian War of 1870, but very rarely with any worthwhile result. All too often the accused parties have ignored the protests or disputed the allegations, or have replied by counter-accusations.

It is then faced with two contradictory versions of the same incidents, one party disputing the other’s allegations. This raises the question of an impartial investigation: does the ICRC have the capacity to conduct such an investigation, either on its own initiative or at the request of a party to the conflict?

Article 30 of the Geneva Convention of 27 July 1929 on the wounded and sick stipulated that at the request of a belligerent, an enquiry into any alleged violation of the Convention must be instituted in a manner to be decided between the interested parties.\textsuperscript{50} This provision was incorporated in the 1949 Conventions without any major change.\textsuperscript{51} It makes clear that the parties to a conflict are primarily responsible for having alleged violations investigated and, while assigning no particular task to the ICRC in this respect, does not preclude it from taking part in such investigations.

The first opportunity to implement this provision came in the Italo-Ethiopian War. Both sides lodged protests with the International Committee, which offered its services to help them set up an international commission of enquiry to examine their respective complaints and determine whether violations of humanitarian law had been committed. Despite the ICRC’s persistent efforts the negotiations were inconclusive, and hostilities ended without
any agreement on the formation of such a commission.52

This setback prompted the ICRC to define its future policy in a memorandum published on 12 September 1939. After stressing that the ICRC’s duty was first and foremost to protect and assist war victims, it specified the conditions on which it might help to form an international commission of enquiry in order to determine whether violations of humanitarian law had been committed. Those conditions were:

a) The ICRC cannot and should not set itself up as a commission of enquiry or arbitration tribunal, or appoint its own members as investigators or umpires.

b) The ICRC will confine itself to lending its good offices with a view to appointing one or more persons from outside its own ranks who are qualified to conduct an enquiry and to take a decision if necessary on the points raised by the parties.

c) The ICRC can act in this domain only with the agreement of the parties concerned. It can propose such an agreement either of its own accord or at the request of one of the parties. The procedure must afford all guarantees of impartiality and enable each party to put its case.

d) No information shall be issued to the public, in the press or otherwise, about a request for an enquiry or the enquiry itself unless the ICRC so agrees.

e) The ICRC’s prime function in time of conflict is to watch over the interests protected by the Geneva Conventions. If it is requested to help in establishing an enquiry procedure, that enquiry must be concerned above all with infringements of the Conventions. Save for exceptional circumstances the ICRC shall not lend its good offices for the investigation of violations of other rules of the law of war, including those relating to methods and means of combat.

f) If the above conditions are not fulfilled and an ICRC representative witnesses or establishes the existence of acts likely to constitute violations of the Conventions or the humanitarian principles, the ICRC shall be the sole judge of what action to take on its delegate’s report.53

In an internal memorandum dated 13 September 1939 the International Committee issued a set of instructions for its delegates. It reminded them that its mission did not in any way include ascertaining violations of the Geneva or Hague Conventions or investigating such violations. Delegates should consequently not allow themselves to be drawn into enquiries or organized in situ inspections, thereby being used to lend credence to the belligerents’ allegations. If ICRC delegates happened to witness violations or evidence thereof they should report them only to the ICRC, which would alone be competent to decide what action to take. Delegates should especially avoid publicity of any kind.54

These guidelines have not changed. The International Committee has confirmed them on various occasions, as in its memorandum of 23 November 1951 and more recently in the International Review of the Red Cross of April...
1981,\textsuperscript{55} and has referred to them when certain belligerents have asked it to investigate alleged violations of humanitarian law.

The Katyn Massacre is a case in point. In April 1943 the German authorities announced that they had discovered the remains of thousands of missing Polish officers in mass graves in the Katyn forest near Smolensk, in territory occupied by the German forces. The German government and media ascribed the massacre to the Soviet authorities, who denied the accusation and claimed that the Germans were the culprits.

On 15 April 1943, the German Red Cross asked the International Committee to take part in the exhumation, and on 17 April the Polish government-in-exile in London asked the ICRC to conduct an investigation on the spot.

The Katyn affair was so widely publicized throughout the world that the International Committee made known its answer in a press release on 23 April 1943, referring to its memorandum of 12 September 1939 and stating that

in principle it would be ready to lend assistance in appointing neutral experts, on condition that all the parties concerned ask it to do so, in conformity with the memorandum sent by the ICRC on September 12, 1939 to the belligerent States.

The Soviet government made no such request, and the Polish government withdrew its own request on 4 May 1943. Since the ICRC’s conditions were not met, the Committee took no direct or indirect part in investigating the matter.\textsuperscript{56}

In February 1952 the government of the Democratic People’s Republic of Korea accused the American armed forces of using bacteriological weapons to cause epidemics of typhus, bubonic plague and cholera in the rear of the North Korean and Chinese forces. Feelings ran high when this accusation was made public. The National Societies of Hungary, Poland, Bulgaria and Romania made strong protests to the ICRC and called upon it to take firm action to prevent any further crimes of this kind.

Secretary of State Dean Acheson refuted the accusations in his telegram of 11 March 1952, and asked the ICRC to conduct an independent enquiry with the object of determining the real causes, the nature and the extent of the epidemics which were stated to have occurred. To establish the facts beyond doubt the United States government undertook to co-operate fully with the ICRC’s experts, and asked that the enquiry should be conducted on both sides of the fighting lines.

On the following day the ICRC sent a telegram to the Prime Minister of the Democratic Peoples’ Republic of Korea, the Commander-in-Chief of the Chinese Volunteers, the United States Secretary of State and the Secretary-General of the United Nations informing them that subject to the agreement of both parties, it would set up a commission which would be under its direction. The commission would be composed of persons who would offer every
guarantee of moral and scientific independence; the ICRC would address itself to known specialists whom it would itself select in Switzerland. It would also invite two or three scientific experts whom it would ask the National Red Cross Societies of Asian countries not taking part in the conflict to propose. The commission would have to be assured of the co-operation of the authorities on both sides of the front, and of experts whom they would nominate. The ICRC asked the parties for their decision at the earliest possible moment so that it could take the emergency measures that would be called for.

The United States government telegraphed on 14 March that it accepted the ICRC's proposals, but although contacted a second time by the ICRC neither the Democratic Peoples' Republic of Korea nor the Commander-in-Chief of the Chinese Volunteer Army replied to the ICRC's telegram.

On 29 April 1952 the ICRC announced that since the conditions for an impartial investigation were not present it was suspending its preparations.57

Following the Arab-Israeli conflict of October 1973 the Egyptian, Israeli and Syrian governments levelled serious accusations against each other of violations of the Geneva Conventions which they asked the ICRC to investigate.

On the basis of common Article 52/53/132/149 the ICRC proposed the constitution of bipartite Egyptian-Israeli and Israeli-Syrian commissions of enquiry to look into the alleged violations and prevent further violations, and expressed its desire to help in applying the Geneva Conventions. On 12 December 1973 it sent an identical note to all three governments in which it declared its willingness to lend its good offices with a view to setting up such commissions to investigate the allegations or to interpret any treaty provision on which the parties disagreed. Each commission would have three members: one appointed by each of the parties, the third by the ICRC or any other organization approved by the parties, chosen from prominent citizens of neutral states. If the ICRC were called upon to nominate the neutral member, it would choose a person from outside the ICRC, in keeping with its practice and principles. The Committee repeated that it did not itself conduct enquiries, this not being its task laid down in the Geneva Conventions.

On 11 March 1974 the Egyptian government declared that it would accept the establishment of a commission of enquiry, on the understanding that it would be composed solely of neutral members and would cover all violations of the Geneva Conventions committed in the occupied territories since the war of June 1967.

The Israeli government informed the ICRC on 2 August 1974 that it would agree to the formation of a commission of enquiry to investigate its complaints concerning grave breaches of the Third Convention.

The Syrian government did not reply to the ICRC's proposals.58

Thus, two of the three governments replied by setting conditions which they knew the adverse party would not accept, and the third did not trouble to acknowledge receipt of the International Committee's note.
So all attempts to form commissions of enquiry based on Article 30 of the 1929 Convention or on common Article 52/53/132/149 of the 1949 Conventions have failed. This is not surprising, for either the accused party knows that an impartial enquiry would confirm that it committed the alleged violations, and would therefore have no reason to take part in an enquiry whose conclusions might be damaging, or the party making such allegations knows that they are unfounded and has no reason to agree to an impartial enquiry which would inevitably discredit it by showing them to be untrue.

Only a really exceptional set of circumstances could induce both adversaries to be equally eager to open an international enquiry. Such circumstances have not yet arisen. Generally speaking, it can be seen that belligerents are quick to complain of violations committed by their adversaries and to call for these to be investigated, only to back off no less promptly when an investigation is offered them.

Since states cannot agree to form the international commissions of enquiry provided for by common Article 52/53/132/149, should not the International Committee itself take a stand on violations of humanitarian law known to it? This question first arose in the Franco-Prussian War of 1870 and is clearly the most sensitive of any that the ICRC may have to resolve. Should the Committee speak out? In what cases and in what way?

Nothing in the Geneva Conventions, the Additional Protocols or the Statutes of the International Red Cross and Red Crescent Movement either gives or denies the International Committee the right to take a stand on violations of humanitarian law.

All persons of sound mind are entitled to state their opinions on such matters and the ICRC is an independent legal entity whose role is to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law.59

It is therefore undoubtedly entitled to express its opinion on violations of humanitarian law, on the understanding that this does not bind the parties to the conflict, who are free to challenge the ICRC’s opinions or dispute their accuracy.

But although the ICRC is entitled to express its opinion it does not necessarily have to do so. Public denunciations of breaches of humanitarian law committed by either side might prove incompatible with its work of relieving suffering. By closing doors to it, inducing the accused belligerent to persist in its attitude and the adversary to retaliate accordingly, they could harm the very victims it is the ICRC’s duty to protect.

The question must therefore be settled by deciding how humanitarian aims would best be served – whether the Committee would help or harm war victims by making a public statement of this kind.
The ICRC’s answer to this question has varied over time and from one conflict to another. On four occasions in the First World War it publicly denounced serious violations of humanitarian law, deciding to speak out when it found that some governments had deliberately committed undeniable violations of such gravity as to undermine the entire treaty system of protection.60

In the Second World War the ICRC was faced with breaches of humanitarian law infinitely more serious than in World War I and on several occasions it considered going public. It was never nearer doing so than in the summer and autumn of 1942, when it realized that the general drift towards total war was destroying all the barriers painstakingly erected by humanitarian law, and when it first got wind of the Nazi regime’s horrific machinery of extermination.

After an initial discussion, the ICRC Central Secretariat drafted an appeal on the conduct of hostilities, highlighting four violations of humanitarian law that appeared to be particularly serious:

- the extension of air raids directed against the civilian population;
- the tightening of the blockade;
- the deportations, hostage-taking and massacres of civilians;
- the treatment of those prisoners of war who were denied the protection of the 1929 Convention.61

Evident care was taken to produce a balanced protest. The ICRC named no culprits, but obviously the first two violations were mainly attributable to the Allies, and the latter two to Germany.

As usual in matters of such importance, the members of the ICRC’s governing body were consulted by correspondence.62 The draft was then submitted to them at their plenary session of 14 October 1942. Most were of the opinion that the ICRC could not possibly keep silent, and at first approved of the draft. But a minority – composed of the most influential members – urged that if it did make a public statement it was likely to achieve less than by discreet negotiation. In the end the ICRC decided not to issue a public appeal, concluding that it would do nothing to improve the belligerents’ conduct.63 It therefore tried to influence the course of events by making confidential representations to the governments concerned, but did not publicly condemn the violations of humanitarian principles which it knew had occurred. When the full horror of Nazi persecution was revealed after the war it was much criticized for this approach.

The ICRC nonetheless considered that the effectiveness of its work, and therefore the victims’ interests, depended on how far belligerent states could count on its traditional discretion. Whilst not absolutely ruling out the possibility of taking a public stance if necessary in exceptional circumstances, it remained convinced that ‘any indiscretion would cost it the confidence it needs and would close to it the internment camps and centres and the hospitals to which its delegates are privileged to have access’.64 In the Korean war
and subsequent conflicts it accordingly refrained from publicly denouncing breaches of humanitarian law known to it, although public opinion was becoming more sensitive to them and international organizations, headed by the United Nations, were increasingly outspoken on current events.

Exceptional circumstances in the Yemen conflict led the International Committee to modify its policy: on two occasions ICRC medical teams treating civilian air raid victims found evidence, and witnesses, of the use of poison gas.

ICRC delegates had seen for themselves the effects of this extremely serious breach of humanitarian law, and had gathered confirmatory evidence of it. Moreover, by attributing to the head of the ICRC mission statements he had never made, the government responsible for the raids had embroiled the ICRC in the controversy over the use of chemical weapons. For all these reasons the ICRC decided to go public. In two press releases, on 31 January and 2 June 1967, it denounced the use of methods of combat strictly prohibited by international law and urged all the parties to give a solemn undertaking never in any circumstances to use asphyxiating gases or any other similar toxic substances.65

The ICRC does not appear to have realized that by publicly denouncing the use of poison gas in Yemen it was departing from the policy it had followed so carefully since the Italo-Ethiopian War. It probably felt that the use of poison gas against a defenceless civilian population, and the firsthand evidence gathered by its medical teams, placed it in one of the exceptional situations on which it had always reserved the right to speak its mind. This is all the more probable since the reports received from its delegates did not lead to any general revision of its traditional policy on violations of humanitarian law, either before or after the press releases of 31 January and 2 June 1967.66

The ICRC had nevertheless – perhaps unwittingly – adopted a new stance. The aforesaid press releases were followed by others condemning violations of international law, for example:

- press release no. 860 of 23 October 1967 on the execution of three prisoners in Nigeria;
- press release no. 915 of 4 October 1968 on the death of two ICRC delegates and two representatives of the World Council of Churches at Ogikwi, Nigeria;
- press releases nos. 925 and 940 of 12 December 1968 and 7 January 1969 on the bombing of hospitals in Biafra;
- press release no. 981 of 7 June 1969 on the shooting down of an ICRC plane over Nigeria;
- press releases nos. 1180, 1181 and 1182 of 28 October, 2 and 6 November 1973, and the appeal of 21 January 1974, on the application of the Geneva Conventions in the Middle East conflict;
- press release no. 1325 of 19 May 1978 on the murder of three ICRC staff members in Rhodesia/Zimbabwe;
press release no. 1333 of 7 July 1978 on the use of weapons in densely populated East Beirut and failure to respect the protective emblem;
press release no. 1340 of 15 September 1978 on the death of two Red Cross volunteers in Nicaragua (joint press release by the ICRC and the League of Red Cross Societies);
press release no. 1341 of 2 October 1978 on indiscriminate shelling of Beirut;
press releases nos. 1398 and 1488 of 16 September 1980 and 20 May 1984 on the ICRC being prevented from carrying out its humanitarian activities in Afghanistan;
press release no. 1412 of 5 April 1981 on the death of two Red Cross volunteers in Lebanon;
press release no. 1416 of 6 June 1981 on the murder of an ICRC employee in El Salvador;
press release no. 1450 of 18 September 1982 on the massacres in Beirut;
press releases nos. 1462 and 1480 of 11 May 1983 and 15 February 1984 on violations of international humanitarian law in the Iran-Iraq conflict;
press release no. 1474 of 4 November 1983 on the indiscriminate shelling of Tripoli (Lebanon);
press releases nos. 1481 and 1567 of 7 March 1984 and 23 March 1988 on the use of chemical weapons in the Iran-Iraq conflict;
press release no. 1498 of 23 November 1984 on the enforced suspension of ICRC activities in Iran;
press release no. 1504 of 3 April 1985 on the transfer to Israel of detainees native to southern Lebanon;
press release no. 1509 of 16 July 1985 on the use for a bomb attack in Lebanon of a vehicle bearing the red cross emblem;
press release no. 1545 of 14 August 1987 on the massacre of civilians in Mozambique;
press releases nos. 1559 and 1582 of 13 January and 19 August 1988 on the expulsion by Israel of Palestinians from the occupied territories;
press release no. 1581 of 18 August 1988 on the death of two administrative detainees in the Qeziot military detention centre in Israel;
press release no. 1606 of 14 April 1989 on the death of six inhabitants of the village of Nahalin, in the Israeli-occupied territories;
press releases nos. 1607 and 1611 of 14 April and 14 August 1989 on the shelling of urban centres in Lebanon;
press releases nos. 1623 and 1624 of 15 and 17 November 1989 on the protection of the civilian population and wounded combatants in El Salvador;
press release no. 1625 of 29 November 1989 on the death of a detainee at Khiam prison in southern Lebanon;
press release no. 1653 of 9 November 1990 on the bombardment of a safety zone protected by the ICRC in Jaffna, in the north of Sri Lanka;
press release no. 1657 of 14 December 1990 on the obstacles preventing the ICRC from discharging its mandate in Kuwait and Iraq;
press release no. 1662 of 26 February 1991 on the protection of Kuwaiti prisoners of war and members of the Coalition armed forces captured by Iraqi forces;
press release no. 1667 of 29 March 1991 on the situation in the Israeli-occupied territories, in particular the settlement policy, the demolition of houses and the expulsion of residents from the occupied territories;
press release no. 1676 of 17 July 1991 on the misuse of the red cross emblem in Yugoslavia;
press release no. 1681 of 28 September 1991 on the attack on an ICRC convoy in Yugoslavia;
press release no. 1685 of 9 October 1991 on the shelling of residential areas and the execution of captured soldiers in Iraqi Kurdistan;
press release no. 1690 of 12 November 1991 on the shelling of cities in Yugoslavia;
press release no. 1691 of 13 November 1991 on the death of civilians as a result of the intervention of Indonesian security forces in East Timor;

To ensure that it acts impartially and consistently when confronted with violations of international humanitarian law, the ICRC has adopted guidelines, published in the *International Review of the Red Cross* of April 1981. After stating that it would take all appropriate steps to put an end to violations of humanitarian law or to prevent their occurrence, and would do so first and foremost on a confidential basis, it added that it reserved the right to make public statements whenever the following conditions are fulfilled:

a) The violations are major and repeated.
b) The steps taken confidentially have not succeeded in putting an end to them.
c) Such publicity is in the interests of the persons or populations affected or threatened.
d) ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources.

These guidelines, which are supplemented by internal instructions, are certainly invaluable when the ICRC has to decide whether to make a public statement, but in practice they leave much leeway for individual interpretation; on such issues, there are no automatic solutions and decisions of this
kind cannot be made solely by applying standards fixed in advance. The ICRC always has to examine each individual case thoroughly in the light of precedent and its own guidelines.

Any institution that dares to speak its mind on such matters has to steer clear of three main hazards:

a) Arbitrary action leading it to condemn some violations but not others that are as bad or worse. To guard against this pitfall it must apply universally accepted rules and strict legal standards, for it is clearly the greatest threat of all to a humanitarian institution endowed with a universal mandate, and the surest way of ruining its credibility and its capacity to act.

b) At the other extreme is legal formalism – the temptation to take cover behind legal rules, condemning as the worst violations those in which it is easiest to identify the rule broken, rather than those intrinsically the most serious and inflicting the greatest suffering.

c) The third, and the most insidious, is to launch a host of appeals that are heeded in inverse proportion to their number and turn protests against outrages into a routine that serves only to soothe the protestor’s conscience. The more the press and public opinion clamour for public denunciations, the greater the temptation to make them. Many international organizations, governmental and non-governmental alike, have cheerfully succumbed to it and appear to enjoy issuing a string of protests no sooner uttered than forgotten.

Has the International Committee managed to follow its chosen line of conduct, whilst avoiding arbitrary action, legal formalism and the dead hand of countless appeals that progressively go unheeded? This is not a rhetorical question, but one it would do well to ask itself, for in this, of all things, the ICRC cannot be true to itself without constantly reviewing its policy and practice.

4. Concluding remarks

‘... if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law’, wrote the eminent legal scholar and erstwhile judge at the International Court of Justice, Sir Hersch Lauterpacht.71

It is, of course, because the machinery for ascertaining and repressing violations is inadequate that many commentators and a large segment of public opinion have come to doubt that public international law, especially the law of armed conflict, truly has the status of law. Can a set of rules whose transgressors incur no obligatory penalty still be styled a legal order?72

The Geneva Conventions and their Additional Protocols are not immune from this criticism. Although the Conventions and Protocol I contain many provisions for the punishment of individuals who have committed grave
breaches of those instruments, they do not prescribe any compulsory form of sanction for states which have trampled them underfoot. However, the most serious violations always entail the responsibility of the states that have ordered or tolerated them, to no less an extent than the responsibility of the individuals who actually committed them.

As the law now stands, the only compulsory procedure for ascertaining violations is the enquiry procedure established by Article 90, paragraph 2, of Protocol I. That procedure covers only a limited number of states between which there are no differences likely to lead to hostilities in the foreseeable future, and is therefore no more than a theoretical possibility. In practice all existing procedure is subject to the agreement of the parties to the conflict concerned. One might as well ask a defendant to pass judgment and pronounce sentence!

Whether it likes or not, the International Committee must accommodate itself to the lacunae of international legislation. It is torn between the attitude of the vast majority of states, which reject any compulsory procedure for ascertaining and repressing violations, and the demands of public opinion and many of those very states, which call upon it to assess and condemn violations of humanitarian law – provided they are not themselves accused. In other words, the ICRC is being requested to make up as far as it can for the lack of a repressive procedure which is in fact unwanted.

This fundamental contradiction in the attitude of public opinion and of many governments explains why the International Committee finds it hard to work out a policy for dealing with violations of international humanitarian law. Whatever it decides, the ICRC will always be at a disadvantage in dealing with an international community that at one and the same time makes completely antithetical demands of it.

Whatever happens, the International Committee must never give way to pressure or emotional reactions, nor act as a substitute for a procedure – which the international community has refused to introduce – to ascertain and repress violations. That is beyond its means and is no part of its mandate.

Notes

1 Article 1 of Protocol I begins with an identical rule.
3 This is a direct consequence of the rule pacta sunt servanda, according to which ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’, Vienna Convention on the Law of Treaties, Article 26.


10 Permanent Court of International Justice, Exchange of Greek and Turkish populations, Advisory opinion of February 21st, 1925, Collection of Advisory Opinions, Series B, no. 10, p. 20.


13 Common Article 47/48/127/144, and Article 83 of Protocol I.

14 Third Convention, Article 127, paragraph 2; Fourth Convention, Article 144, paragraph 2; Protocol I, Article 83, paragraph 2.

15 Common Article 50/51/130/147 of the Geneva Conventions, and Article 85 of Protocol I.

16 Article 88 of Protocol I enlarges on the Geneva Convention as regards mutual assistance in criminal matters.

17 Common Article 49/50/129/146, paragraph 3.

18 Final Record 1949, vol. II-B, p. 37, statement by Yingling.

19 The designation of the protected persons is adapted to each Convention. In the First Convention it is ‘the wounded and sick, members of medical personnel and chaplains’; in the Second Convention ‘the wounded, sick and shipwrecked, medical personnel and chaplains’; in the Third Convention, ‘prisoners of war’, and in the Fourth Convention ‘protected persons’.


24 Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans...


27 Article 41 of draft Convention I and Article 39 of draft Convention II, XVIIth International Conference of the Red Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims (Document no. 4a), ICRC, Geneva, May 1948, pp. 28–9 and 50.


30 Commentary on the Additional Protocols, p. 1040.


34 Protocol I, Article 90, paragraph 1.

35 Article 90, paragraph 2(d).


40 Minutes of the International Committee, vol. III, sessions of 17, 23, 26, and 29 August and 7 September 1870; vol. IV, 24 September 1870, etc.

41 Minutes of the International Committee, vol. IV, sessions of 21 January, 4 and 15 February, 1 March and 12 April 1871.


50. Actes 1929, p. 670; for further details see pp. 119–20 above.


52. See Book I, Chapter VII, Section 6 above, pp. 142–57.


61. ‘Appel en faveur de l’application des principes essentiels du droit des gens relatifs à la conduite des hostilités’ (Appeal for the application of the essential principles of humanitarian law relating to the conduct of hostilities), Draft no. 3, 13 August 1942, and Draft no. 4, 16 September 1942, ICRC Archives, file CR 73, box 50.

62. ICRC Archives, file CR 73, box 50.

63. Minutes of the ICRC, Plenary session of 14 October 1942.


Minutes of the Presidential Council, 19 and 30 January 1967, 8 June 1967; minutes of the plenary sessions of 9 February, 2 March, 25 May and 1 June 1967. As regards alleged violations of the humanitarian conventions, the report compiled by the Commission for the study of the doctrine, activities, methods and organization of the ICRC, which the ICRC adopted in 1968, merely repeats the ICRC's previous policy in its Annex IV.

This list, which has been compiled solely on the basis of ICRC press releases, is not exhaustive and the usual reservations must be made. The ICRC obviously has other means of denouncing violations of humanitarian law, even though press releases are the most formal means of doing so. Moreover, since the distinction between an appeal to respect the humanitarian rules and a denunciation of violations thereof is often tenuous, any such pronouncement is open to different interpretations.


Ibid., p. 81.


No jurist can doubt that the answer is ‘yes’. What characterized a legal order is not the material sanction, but the faculty of classifying behaviour as either lawful or unlawful, as Professor Krystyna Marek makes admirably clear in the following passage.

By definition, all law, like any other set of rules, restricts the freedom of the persons subject to it. By the very fact of laying down rules, it orders, allows and forbids. In other words, a legal rule provides the criterion that separates the actions of those subject to it into two broad categories, lawful and unlawful.

However primitive the legal order may be, that is its hard core. Without that fundamental distinction between lawful and unlawful acts it cannot exist. A legal order can exist without centralized sanction, without independent organs of its own, without a clear hierarchy of norms, without compulsory jurisdiction, and so on. All codes of domestic law began life at this primitive stage, and international law is still in it. However serious these imperfections may be, they can still be reconciled with the idea and existence of a legal order; but the idea and existence of a legal order become impossible if the distinction between lawful and unlawful acts is abolished. Without that distinction a code of laws is as yet unborn or already dead.


References


The ICRC’s role with regard to alleged violations of humanitarian law is considered in the following five studies: Max Huber, ‘Croix-Rouge et neutralité’, RICR, no. 209, May 1936,
The ICRC and the Protection of War Victims


BOOK III

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AS A SUBJECT OF INTERNATIONAL LAW

We know what we are, but we know not what we may be.
William Shakespeare,
Hamlet, Act. IV, sc. 5.
INTRODUCTION

Become that thou art!
Friedrich Nietzsche,
_Thus Spoke Zarathustra_,
Book IV, Chapter 1.

My long-suffering readers might justifiably accuse me of telling them all about the work of the International Committee of the Red Cross and its responsibilities and prerogatives, but nothing of its status and composition, rather as though I were writing an actor’s life story by listing all the parts he ever played, but saying nothing of the man.

I might have done better to begin by describing the ICRC’s status and saying who its members are, how it is organized and what its relations are with Switzerland, where its headquarters are located. But I believe that it is what the International Committee does that paints its portrait, just as true artists reveal their personality through their works. We get to know Leonardo da Vinci, Raphael, Rembrandt and Turner by contemplating their pictures, not by reading about their lives.

In Book I, therefore, I sought to trace the origin and development of the tasks assigned to the International Committee, and in Book II to describe, in an analytical and systematic manner, the functions and prerogatives conferred on it by international humanitarian law today.

The time has now come to attempt to define the ICRC’s position as a subject of international law. In the next three chapters I shall therefore discuss three closely related questions:

- the ICRC’s legal personality;
- its composition;
- its relations with Switzerland.

Questions relating to the ICRC’s internal organization will be left aside since they are not relevant to this book.
CHAPTER I

THE LEGAL PERSONALITY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

La personnalité juridique fait depuis longtemps le désespoir des juristes.
Raymond Saleilles, De la personnalité juridique: Histoire et théories, 1910.

Is the International Committee of the Red Cross qualified to possess rights and obligations that flow from public international law, in other words, rights that states are bound to respect, and obligations they could require it to perform?

The same question was raised at the beginning of this work, but no attempt was made to answer it. It was acknowledged, but only hypothetically, that the ICRC could possess rights and obligations governed by international law, and the tasks and powers that international humanitarian law assigns to it for the protection of war victims were identified. The reader may reasonably call for an examination of this hypothesis.

An enquiry into the nature of the rights and obligations of the ICRC obviously raises the question of its legal personality in terms of international law.

It would be tempting to take a purely phenomenological approach and answer simply by noting that the ICRC exists and is active internationally, citing a series of characteristics – namely the part it has played in drawing up the humanitarian Conventions, its universally recognized role as a neutral intermediary in armed conflicts, the functions and powers assigned to it for protecting war victims, the relations that states entertain with it through their diplomatic services, its dispatch of delegates and conclusion of agreements governed by international law, and its ability to call upon belligerents to respect the rights it is recognized as possessing – as evidence that it is active on the international plane and that its actions are governed by public international law.

This answers the question of the ICRC’s legal personality by means of its outward manifestation. Just as Diogenes proved that there is such a thing as movement by getting up and walking, so the International Committee proves that it has an international legal personality by its life and work.

Nevertheless the question still has to be approached analytically. The ICRC’s own view should first be taken into consideration, but its reflection
on this point has usually been short-lived. This is not surprising. It is there to bring protection and assistance to victims of war, civil war and internal strife, not to meditate on its own status.

The Geneva Conventions and their Additional Protocols describe the ICRC as an ‘impartial humanitarian organization’ but do not more fully define its status. The Statutes of the International Red Cross and Red Crescent Movement are also silent on this point. And except for a few recent studies, little doctrinal interest has been shown in the legal personality of the Red Cross, and still less in that of the ICRC. Any attempt to solve the latter enigma will therefore have to be by reference to general international law.

* * *

According to its Statutes the International Committee of the Red Cross has legal personality as an association governed by Article 60 ff of the Swiss Civil Code. These articles regulate non-profit political, religious, scientific, artistic, recreational, charitable and other associations whose statutes express their wish to be organized in corporate form. The very liberal provisions of the Swiss Civil Code impose on these associations only a few general rules regulating formal rather than substantive aspects, leaving them the greatest freedom as to their aims, the recruitment of their members and details of their organization. Articles 60 ff of the Swiss Civil Code apply to any form of private non-profit organization, from students’ associations and political parties to male voice choirs and village football clubs.

By basing its own Statutes on Articles 60 ff of the Swiss Civil Code the International Committee has been faithful to its private and Swiss origin. It has lost no opportunity to point out that it is simply and solely a private association under Swiss law, and one can only accept this definition as accurate.

However, this is not the last word on the International Committee’s legal personality, for the ICRC performs international functions, whereas a student’s association, a male voice choir or an amateur football club has no such aspirations.

Since the ICRC works mainly in the international sphere, the question should be examined in the light of international law to see whether, besides its legal personality in Swiss law within the meaning of Articles 60 ff of the Swiss Civil Code, it also possesses some measure of international legal personality.

Before venturing a reply to this question, the concept of international legal personality must be defined.

In classic international law only states had international legal personality, and only states took part in framing international law, which was addressed only to them. This conception – which reduced international society to a
The juxtaposition of a few inward-looking states – was shattered by the pressure of social requirements.

One was the recognition of groups that were not states but on which international law conferred specific rights and duties; for example, insurgents, by means of the recognition of belligerency; minorities – or at least some of them – through the systems of protection instituted by the League of Nations; and trade unions and employers’ associations, by virtue of the International Labour Conventions. Even individuals were recognized as having certain rights under the international conventions for the protection of human rights and fundamental freedoms.

States too, prompted by the day-to-day needs of international life, formed organizations to co-ordinate their activities and facilitate co-operation in matters of common interest. Examples are the European Danube Commission (1856), the International Telegraph Union (1865), and the Universal Postal Union (1874). These developments eventually led to the formation of worldwide organizations for the maintenance of international peace and security, namely the League of Nations and its successor the United Nations.

But the question then arises as to what constitutes international legal personality. Since the classic criterion, whereby only a state could be a subject of international law, no longer applies, how is a subject of international law to be defined? Is it any holder of a right guaranteed by international law, even a holder who, as often happens, cannot singly take international action to claim the benefit of this right? Must it be concluded that, as some commentators suggest, the only real subjects of the international legal order are individuals, as in the final analysis only individuals are capable of understanding and obeying the rules?

These questions were settled with absolute clarity by the International Court of Justice in its advisory opinion of 11 April 1949 on reparation for injuries suffered in the service of the United Nations. The principles on which the Court based its opinion should therefore be recalled before considering whether the ICRC has legal personality.

The Court was requested to consider whether, as an organization, the United Nations had the capacity to bring a claim against a state responsible for injury suffered by an agent of the United Nations in the performance of his duties.

This evidently posed the question whether the United Nations has legal personality.

In the words of the Court:

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?

The ICRC and the Protection of War Victims
The Court thus made recognition of international legal personality subject to two conditions:

- possession of rights that states are bound to respect; and
- ability to claim the benefit of those rights.

Before seeking to determine whether the United Nations fulfils this dual requirement, the Court observed that in any legal system not all its subjects necessarily have identical rights. In the words of the Court:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.6

The Court went on to show that the United Nations has international legal personality, pointing out that

The Charter has not been content to make the Organization created by it merely a centre ‘for harmonizing the actions of nations in the attainment of these common ends’ (Article 1, para. 4). It has equipped that centre with organs, and given it special tasks.7

But how could the United Nations perform those tasks if it did not have the capacity to possess the rights and powers it needed to do so, and to avail itself of those rights on the international plane?

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane .... It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a ‘super-State’, whatever that expression may mean .... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.8

Finally, to determine whether the sum total of the rights of the United Nations includes capacity to bring international claims, the Court points out that ‘... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’.9

We can now revert to the question whether the International Committee of the Red Cross has international legal personality.
The conclusions of the International Court of Justice concerning the United Nations cannot of course be transposed without further examination to the International Committee, for the relations which the states party to the Geneva Conventions maintain with the ICRC cannot be equated with those which the member states of the United Nations have undertaken under the Charter to maintain with the Organization.

On the other hand, there is nothing to prevent an examination of whether the ICRC has legal personality in the light of the principles set forth by the Court in its advisory opinion of 11 April 1949. Here the crucial point is whether the states party to the Geneva Conventions have entrusted the ICRC with a mission it could not fulfil unless it also had rights which it is entitled to ask them to respect. Everything in the foregoing pages shows clearly that such is the case.

The ICRC has always been convinced that it had a mission to perform. This is clear even from the earliest proceedings of the Committee of Five. Thus the International Committee wrote to Emperor Napoleon III on 2 May 1864:

Left to fend for itself, the Committee would probably have had to wait a long time for the civilized nations to endorse unanimously the principles it is charged with propagating.10

Similarly, the International Committee mentions ‘the mandate’ which it received from the Constituent Conference of October 1863, the ‘heavy responsibility’ incumbent upon it,11 ‘its work’ which it cannot regard as finished,12 ‘its feeling that it has a great duty to humanity’,13 ‘its role’ of acting as a link between the Committees of the various countries,14 ‘the role’ assigned to it,15 ‘its attributions’,16 ‘its obligations’,17 ‘the functions’ in which the Paris Conference of 1867 confirmed it,18 ‘its mandate’,19 ‘the very special nature of its functions’,20 ‘the task’ incumbent upon it,21 ‘the limits of the mandate that was laid down for it by the Berlin Conference’,22 and more generally and repeatedly, ‘its duty’.23

Far from being empty formulas or rhetorical flourishes, these words express a conviction that was to guide the International Committee’s acts. There is ample evidence of this. For example, in September 1870 the heads of the Basel Agency found that Germany was retaining the wounded it should have repatriated in compliance with the fifth Additional Article to the Geneva Convention of 22 August 1864. When consulted by them about the representations they wished to make to General von Röder, Minister of the North German Confederation in Berne, the International Committee took the view that the representations were justified, but should be made by itself and not by the Agency. It said so as follows:

The Agency has also sent us a draft letter to M. de Roeder pointing out that Germany is not abiding by Additional Article 5 to the Convention.

The Committee regards this letter as so right in what it says, and so important, that it has decided to make this request itself to M. de Roeder so that he may
make a suitable approach to the King of Prussia. The Basel Agency is dealing
directly with this matter, and it is therefore not surprising that it has recognized
that such an approach should be made, but it is really the International
Committee’s province to do all it can to persuade heads of States to respect the
Convention they have accepted.24

The ICRC’s firm belief that it has a mission that imposes obligations upon it
has steadily grown with each successive war. At the start of the First World
War it declared that it would do its utmost to perform the ‘role of intermedi-
ary’ assigned to it in asking for and forwarding relief between Red Cross
Societies.25 It announced that it would take the necessary steps ‘to accomplish
the mandate given it by the Washington Conference’.26 In reminding the gov-
ernments of the belligerent states of the need to see that the Geneva
Convention was strictly and faithfully applied, the International Committee
declared that it was conscious ‘of discharging the humanitarian mission
entrusted to it’.27 When it ran into financial difficulties it made known its
conviction that it must ‘continue to carry out its mandate faithfully unto the
end’.28 When urging the belligerents to refrain from reprisals against prison-
ers of war, the Committee stated that it was ‘true to its duty as International
Committee’.29 Similarly, in its note to the German government on the tor-
pedoing of hospital ships, the Committee pointed out that it ‘has the right
and duty to see that Red Cross principles and the principles of the Geneva
Convention are respected, and to draw attention to any infringements of
them’,30 and so forth.

In its offers of services to the governments of the belligerent states at the
start of the Second World War the ICRC declared that it was at their disposal
‘to contribute by humanitarian means, in accordance with its traditional role
and to the full extent of its powers, to remedying the evils that the war will
bring into being’.31 In its memorandum of 12 September 1939 on its activities
concerning violations of international law, it stated that ‘its essential task in
time of war’ was ‘in accordance with its tradition, to carry out the humani-
tarian functions vested in it either directly by the international Conventions
or by its own Statutes and those of the International Red Cross’, and that
‘its special mission, which takes precedence over all others, is to watch over
the interests protected by the Geneva Conventions ...’.32

It is thus clear that the International Committee is convinced it has been
given a mission to perform which imposes obligations upon it.

This conviction is expressed in Article 4 of its Statutes, which states that
‘the role of the ICRC shall be in particular ... to undertake the tasks incum-
bent upon it under the Geneva Conventions, to work for the faithful application
of international humanitarian law ...; to endeavour at all times ... to
ensure the protection of and assistance’ to victims of war, civil war and inter-
nal strife ... and ‘to ensure the operation of the Central Tracing Agency as
provided in the Geneva Conventions ...’.33

This conviction is also reflected in its offers of services to the belligerents in
each new conflict.
For example, in its telegrams of 26 June 1950 and on later dates to all the parties to the Korean conflict the ICRC said that it placed itself at the belligerents’ disposal so that it may perform ‘its traditional tasks’. In its telegrams of 2 November 1956 to the Egyptian, Israeli, British and French governments the ICRC declared that it was ready to ‘assume all tasks foreseen for it in [the Geneva Conventions] and take all requisite humanitarian initiatives warranted by events’.

Similarly, in its telegrams of 4 November 1956 to the Hungarian and Soviet governments the ICRC stated that it was ready, ‘in accordance with its traditional mission, to assume the tasks assigned to it by the Geneva Conventions’.

In its appeal of 11 June 1965 on the Vietnam War, the ICRC emphasized that the belligerents were bound ‘to implement the provisions [of the Geneva Conventions] and to permit the ICRC to carry out its mission as a neutral intermediary as laid down in these Conventions’.

In its telegrams of 5 June 1967 to the governments of the United Arab Republic (Egypt), Israel, Jordan, Syria and Lebanon the ICRC stated that it was ‘ready to assume all the tasks assigned to it by the Geneva Conventions and to take all or any humanitarian initiatives that events may require’. In more recent communications the ICRC makes known its determination to fulfil ‘its role as stated in the Geneva Conventions’, ‘its humanitarian and traditional treaty mandate’, ‘the mandate assigned to it by the Geneva Conventions’ and ‘its mandate in conformity with the Geneva Conventions’.

Thus, diplomatic correspondence confirms the International Committee’s conviction that it has been entrusted with a mission which imposes definite obligations upon it.

This conviction is shared by the International Red Cross and Red Crescent Movement, as is shown by Article 5 of the Movement’s Statutes, which states that ‘The role of the International Committee ... is in particular:

c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;

d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;

e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions.’

The same conviction that the ICRC has a humanitarian mission is also expressed in many resolutions adopted by International Conferences of the Red Cross.

Thus the Eighteenth International Conference (Toronto, 1952) records that the ICRC was able to ‘perform its traditional role’ towards prisoners of war.
held by the United Nations Command in Korea, but was prevented from ‘performing that function’ with respect to prisoners of war held in North Korea.\footnote{The Twentieth Conference (Vienna, 1965) noted the constant imbalance between the ICRC’s financial resources and the needs arising from ‘the activities it is obliged to carry out in application of the Geneva Conventions’. It also asked that the ICRC be enabled ‘to carry out its traditional humanitarian functions to ameliorate the condition of prisoners of war’.\footnote{The Twenty-first Conference (Istanbul, 1969) mentioned ‘the new and difficult activities’ that the ICRC ‘has continually to undertake’ and ‘the heavy responsibilities it has to assume’ and asked that the ICRC be given the means ‘which will enable it always to be equal to the work requested of it or assigned to it’.\footnote{The Twenty-second Conference (Teheran, 1973) similarly noted ‘the very important task which is being performed by the ICRC and which, in view of the international situation, is constantly increasing’.\footnote{The Twenty-fourth Conference (Manila, 1981) noted the persistence of armed conflicts in which the ICRC ‘is unable to fulfil its humanitarian task’, and that in several armed conflicts fundamental provisions of the Geneva Conventions are violated and that these grave violations have often the consequence of impeding the International Committee of the Red Cross in the discharge of its activities pursuant to international law applicable in armed conflicts. It asked that the ICRC ‘be granted all the facilities necessary to discharge the humanitarian mandate confided to it by the international community’.\footnote{Similarly, the Twenty-fifth Conference (Geneva, 1986) pointed out in a resolution on ICRC financing by governments that ‘the humanitarian mandate of the ICRC is based essentially on the 1949 Geneva Conventions, to which 165 States are Parties, which have thereby undertaken to provide the ICRC with the means required to discharge that mandate’.}\footnote{The Diplomatic Conference of 1949 was no less convinced that the ICRC has been given a mission that imposes obligations upon it. Admittedly, on careful study of the Geneva Conventions it will be seen that the only obligation they explicitly assign to the ICRC is to appoint the neutral members of the Mixed Medical Commissions formed to examine seriously sick or seriously wounded prisoners of war and decide whether or not they are to be repatriated. However, the Conventions do confer rights upon it which inversely create obligations for parties to conflict. They include the right to receive lists of prisoners of war and civilian captives, the right for its delegates to have access to all places in which prisoners of war and civilian prisoners are held and to converse freely with them, and the right to recognition of and respect for its special position as regards relief operations for prisoners of war and civilian captives. These rights can only be regarded as the counterpart of the duties assigned to the ICRC.}}\footnote{}}
The Diplomatic Conference also left no doubt whatsoever about its conviction that the ICRC has been given a mission that imposes obligations upon it, both in time of war and in peacetime. Thus Resolution 11 states that:

Whereas the Geneva Conventions require the International Committee of the Red Cross to be ready at all times and in all circumstances to fulfil the humanitarian tasks entrusted to it by these Conventions, the Conference recognizes the necessity of providing regular financial support for the International Committee of the Red Cross.\(^{52}\)

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–7) expressed itself to similar effect, but even more clearly, for Article 81, paragraph 1, of Protocol I reads:

The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts ....

Beyond all doubt, therefore, the international community has entrusted the International Committee with a mission which it is bound to fulfil; a mission deriving from international conventions, from ICRC practice and from acceptance by states of that practice. Over time, that acceptance has created custom.

It is also beyond all doubt that the ICRC could not fulfil that mission if it did not possess the rights and competence it needs to do so and was not entitled to demand that these be respected, but had to invoke the diplomatic protection of Switzerland or another state whenever a belligerent infringed its recognized rights.

The international legal personality of the International Committee of the Red Cross is thus clearly established.

This does not mean that the ICRC has all the rights of a state or that its legal personality is comparable to that of a state, but only that it has the rights it needs to perform the duties entrusted to it, together with the capacity to avail itself of these rights in its relations with other subjects of the international legal order. It is therefore endowed with a functional legal personality, limited to the performance of the tasks entrusted to it for the protection of victims of war, civil war and internal strife, and resulting from its position in the International Red Cross and Red Crescent Movement.

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On 16 October 1990 the United Nations General Assembly adopted by consensus a resolution inviting the International Committee to participate in its sessions and work in the capacity of an observer.\(^{53}\) By this exceptional decision the General Assembly drew attention to the special role and mandate conferred upon the ICRC by the Geneva Conventions, and implicitly recognized its international legal personality.\(^{54}\)
The determination that the ICRC has international legal personality is of interest only because of its consequences. However, as its position on the international stage is unique and cannot be compared with that of any other institution, the content of its legal personality cannot be adequately deduced from a pre-established category. Instead, an attempt must be made to define the rights and obligations that make up that personality, using a functional approach, since that personality is itself functional, to identify the rights and powers the ICRC requires to perform the tasks assigned to it.

The capacity to possess rights and obligations based on international law is inherent in the very notion of international legal personality. The ICRC must therefore be recognized as qualified to possess rights and obligations governed by international law.

It must also be recognized as having the capacity to acquire contractual rights and obligations governed by international law, for it could not discharge its responsibilities if it had no power to conclude agreements with states or other subjects of international law on the terms and conditions of its activities. It therefore has the faculty to conclude international agreements within the limits of its competence.\textsuperscript{55}

Since the ICRC possesses a degree of international legal personality, its practice is undeniably relevant to the development of international law and, when consistent and accepted by states, entitles it to contribute to the development of customary rules. This, indeed, is evident from the whole history of the ICRC, especially its work for prisoners of war and civilian internees.

The ICRC is also entitled to expect the states party to the Geneva Conventions to recognize its legal personality on their territory, together with the powers it needs to perform the functions assigned to it, in particular the capacity to contract; to acquire and dispose of movable and immovable property; and to institute legal proceedings.\textsuperscript{56}

To a limited extent the ICRC furthermore enjoys the right of passive legation, namely the right to receive diplomatic agents, as states do not object to dealing with it through their diplomatic missions. Up to the end of the Second World War, this used to be done through the legations accredited to Berne or through the consulates in Geneva, but since 1945 has been through the Permanent Missions to the European Office of the United Nations and to the international organizations in Geneva. However, its exercise of this right is restricted because the ICRC has no territorial base and therefore depends on the headquarters agreements concluded between the United Nations and Switzerland.

The ICRC undoubtedly possesses the right of active legation, namely the right to send diplomatic agents, for it is entitled to appoint delegates to represent it in belligerent and other states and to perform the tasks assigned to it.

The International Committee is entitled to expect that its delegates shall not be treated merely as private persons, but shall be granted the appropriate status and the facilities necessary for the performance of their mission. It has sometimes been suggested that they should be granted diplomatic privileges
and immunities; however, the privileges and immunities the ICRC can claim for its delegates are so obviously functional ones that the status granted to international officials seems better suited to their tasks and activities. This, indeed, is the practice that appears to be gaining ground at present.

In actual application it means that ICRC delegates should be granted immunity from penal and civil jurisdiction in respect of words spoken or written and all acts performed by them in their official capacity. They should not be obliged to bear witness.

They and their spouses and dependants should be exempt from immigration restrictions and alien registration. Instead, arrivals, departures and changes in duties should be reported to the Ministry of Foreign Affairs, which may issue each delegate with an identity card attesting to his or her official status.

Delegates and their families must of course be exempt from any form of national service, especially military service of any kind.

They must also be exempt from taxation on the salaries and emoluments paid by the International Committee, and be accorded the same privileges in respect of exchange facilities as are accorded to representatives of other international organizations. They must have the right to import free of duty their personal effects and furniture, and a motor vehicle if any. Goods imported duty-free may be re-exported on the same conditions at the end of the delegate’s assignment, but may not be sold in the territory of the host country without permission from the authorities thereof.

In time of war or crisis delegates and their families must be given the same repatriation facilities as representatives of other international organizations.

It is understood that delegates are granted the above privileges and immunities in the interests of the International Committee and not for their own personal benefit. It is likewise understood that these privileges and immunities shall not in any circumstances exempt them from having to respect the laws of the host country. In return, the ICRC must consent to waive the immunity of any delegate in any case where, in its opinion, that immunity would impede the course of justice and can be waived without prejudice to its mission. The host country may request the recall of any delegate deemed to have acted in a way incompatible with his or her status.

Unless a special agreement exists to that effect, such privileges and immunities are not accorded to ICRC delegates who are nationals of the host country or are permanently domiciled there. Locally recruited employees do not benefit from them, and the ICRC has found that it cannot effectively protect such employees vis-à-vis the host country. Care must therefore be taken not to ask them to do anything that might place them in an irregular – or simply potentially difficult – position with regard to their national authorities.

The International Committee’s property and assets must enjoy exemption from every form of legal and administrative process, except in so far as in any particular case the ICRC has expressly waived its immunity.
The delegation’s offices and warehouses and the offices of the Central Tracing Agency are inviolable. Officials of the host country may not enter them unless the head of delegation so agrees. These premises, their furniture and other contents, such as archives, documents and correspondence, may not be searched, requisitioned, confiscated, expropriated or subjected to any other form of interference, whether by executive, judicial, administrative or legislative action. Similarly, the delegation’s vehicles are immune from requisition, confiscation and expropriation. However, the International Committee must not allow its premises to be used as asylum by persons caught in the act (flagrante delicto) and seeking to evade arrest, or in respect of whom a warrant has been issued or who are wanted for the execution of a decision made by the courts.

The delegation must be exempt from all direct taxes, except when the said taxes constitute charges for public utility services. It will renounce the right to apply for exemption from indirect taxes in so far as the missions of other international organizations are also subject thereto.

The delegation must be exempt from customs duties or any equivalent charge on articles necessary to its activities. It must be free to hold funds and operate accounts and to import the sums necessary to its activities, convert them into other currencies and re-export amounts not used. Goods imported by the delegation duty-free may not be sold in the territory of the host country without permission from the authorities thereof.

The delegation must also be exempt from all taxes and customs duties on goods imported for distribution in its relief operations. With regard to relief supplies it must conform to the law of the host country on hygiene and safety and to commercial regulations. With the agreement of the competent authorities it may use vacant warehouses to store goods to be distributed in relief operations. It must not sell duty-free goods without permission from the competent authorities.

For its official communications the delegation must enjoy treatment not less favourable than that accorded to the missions of other international organizations as concerns priorities, rates and taxes on mail, telegrams, telephone and other means of communication.

The ICRC is entitled to use radio communications for messages between its headquarters and its delegations, using the frequencies assigned to it for its sole use by the International Telecommunication Union. These must not be used for any but official ICRC communications.

The official correspondence of the ICRC is inviolable and may not be subjected to any form of examination or censorship. It is understood, however, that letters and parcels to or from prisoners of war or civilian captives, and civilian family messages forwarded by the ICRC, will be subject to censorship by the states to and from which they are sent, unless the competent authorities waive their right to such examination.

The ICRC is entitled to expect the state of residence to take adequate precautions to protect its delegates, premises and property in so far as is
reasonable given the risks inherent in its mission. These precautions may not
unduly hinder its delegates’ activities nor serve as a pretext for refusing its
offers of services.

It would be untrue to say that the privileges and immunities listed above
have invariably been recognized in all countries and circumstances.\(^{57}\) Some
countries have treated ICRC delegates in the same way as representatives of
voluntary agencies without special status. Other countries have treated them
with the consideration normally shown only to heads of diplomatic missions.
In many cases the question of their status has never formally arisen, delegates
and their official contacts having worked out among themselves informal
methods of co-operation that have enabled the ICRC to fulfil its mission
without having to worry about its status. At present, then, there appears to
be no constant and uniform practice, but the most logical arrangement, and
the one that best suits both the ICRC and the host state, is to grant ICRC
delegations the status enjoyed by the missions of other international organ-
izations. As a humanitarian institution which has an international mandate
and hence a large measure of international legal personality, the ICRC may
reasonably expect to be accorded the privileges and immunities just men-
tioned, and seems increasingly to be receiving them. With a few variations
that need not be considered here, the headquarters agreements concluded in
recent years between the ICRC and various states have granted it privileges
and immunities of the kind just mentioned.\(^{58}\)

Lastly, the ICRC is entitled to take action at international level to demand
that its recognized rights be respected. While it cannot take its case to the
International Court of Justice, because only states are entitled to appear
before the Court,\(^{59}\) it is free to claim the benefit of its rights by other means.

The first means open to it is negotiation. The ICRC can try to persuade the
state or states infringing its rights to respect and if possible restore them.
Where the harm done is such that restitution is impossible, it is entitled to
demand reparation.\(^{60}\)

If it cannot get satisfaction by negotiation the ICRC can appeal, if circum-
stances warrant it, to public opinion and all the states party to the Geneva
Conventions. On 21 January 1974, for instance, the ICRC issued an appeal
drawing attention to serious violations of the Conventions committed in the
Middle East conflict and the hindrances that were preventing it from dis-
charging its mandate there, and reminded the 135 states party to the
Conventions that they were jointly responsible for ensuring that the
Conventions were respected.\(^{61}\) Similarly, in its appeal of 16 September 1980
the ICRC asked to be permitted to carry out its traditional tasks to the full in
the Afghan conflict.\(^{62}\) In its appeals of 9 May 1983 and 13 February 1984 to
all states party to the Geneva Conventions the ICRC denounced the obstacles
it had encountered in its work in connection with the Iran-Iraq conflict.\(^{63}\)

The ICRC can also appeal to the International Conference of the Red
Cross and Red Crescent. In its report to the Twenty-fourth International
Conference (Manila, 1981) the ICRC cited the many conflicts in which it had
been unable to carry out the tasks assigned to it; and in its Resolution IV the Conference deplored the fact that the ICRC was being refused access to the captured combatants and detained civilians in the armed conflicts of Western Sahara, Ogaden and Afghanistan and urged all parties concerned to enable the International Committee to carry out its mission.64

If a difference arises between the ICRC and a state or international organization which cannot be settled by amicable agreement, the Committee and the other party may, if they so agree, refer it to a court of arbitration if clarification of a point of law is required, or to an international commission of enquiry if it is mainly a matter of ascertaining whether events likely to entail the responsibility of either party actually took place.

The headquarters agreement between the International Committee and the government of Cyprus, concluded on 28 March 1975 in order to determine the status of the ICRC delegation in Cyprus and the scope of its activities, accordingly stipulated that all disputes concerning the interpretation and application of the agreement which could not be settled by negotiation or other agreed mode of settlement should be referred to a Tribunal consisting of two arbitrators – one named by the Cyprus government and one by the ICRC – and one umpire, to be chosen jointly. If the two parties failed to agree on the choice of umpire, the Cyprus government or the ICRC could ask the President of the International Court of Justice to make the appointment. Arbitral awards by the Tribunal were to be considered final.65 The headquarters agreements concluded on 1 April 1978 with Lebanon, 19 April 1983 with Zaire, 15 June 1988 with Nigeria, 11 January 1991 with Tunisia, 10 May 1991 with Senegal, 28 June 1991 with Namibia, 29 October 1991 with Kuwait and 19 March 1993 with Switzerland contain provisions identical with these.66

The ICRC does not appear to have taken part in any arbitral procedure, either pursuant to these provisions or otherwise, but the virtue of arbitration clauses such as those in the nine headquarters agreements just mentioned lies not so much in their actual implementation as in the legal security they give the contracting parties.

The International Committee and the United Nations did, however, agree to ask an international commission of enquiry to investigate the tragic deaths in Elisabethville on 13 December 1961 of ICRC delegate Georges Olivet and two volunteers from the Katanga Red Cross Society in circumstances that appeared to entail the responsibility of the United Nations. The United Nations denied legal or financial liability, but in view of the findings of the commission of enquiry decided to pay the International Committee a lump sum, which was distributed among the families of the victims.67

The ICRC’s humanitarian role, its traditions and preference for conciliation obviously make it most unlikely to resort to adjudicatory procedures in the foreseeable future. But as regards its legal personality the point is not whether it is likely or unlikely to use such methods to settle differences, but that these methods exist and that it has the right to ask its partners to agree
with it to use them if circumstances justify their use. For reasons of expediency that do not impair its legal personality, in practice it does not exercise that right.

The ICRC is thus entitled, and able, to maintain its rights in the comity of nations.

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The International Committee has always been true to its traditions. It began as a private Swiss association. It is still that. But the world around it has changed. On international legal personality as on other matters, prevailing doctrine and positive law have evolved in line with the transformation of international society. The International Court of Justice acknowledged that evolution in its advisory opinion of 11 April 1949 by recognizing the prime importance of a functional approach. In the light of the principles made clear by the Court there can be no doubt that the International Committee of the Red Cross has an independent, limited and functional legal personality.

The time has come for it to realize all that this means and to shoulder the responsibilities it brings.

Notes

1 See the General Introduction, pp. xxviii–xxx above.
2 ‘As an association governed by Article 60 and following of the Swiss Civil Code, the ICRC shall have legal personality’, Article 2 of the Statutes of the International Committee of the Red Cross of 24 June 1998, IRRC, no. 324, September 1998, pp. 537–43, esp. p. 538.
3 For instance: ‘... the ICRC is essentially a private organization, in spite of the special position it occupies under international law ...’, Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939–June 30, 1947), ICRC, Geneva, May 1948, vol. I, p. 159; ‘... though a private organization, the ICRC ...’, ibid., p. 188; ‘...the intervention of a private organization, the ICRC ...’, ibid., p. 218, etc.; ‘Clearly, the tasks which it was hoped the delegates would take over were far beyond what was feasible for a handful of representatives of a private organization such as the ICRC’, ‘The International Committee of the Red Cross in Palestine’, RICR, English supplement, vol. I, no. 6, June 1948, pp. 98–108, esp. p. 102; ‘Cependant – et c’est sur ce point que l’on commet les plus fréquentes et les plus graves erreurs quant à la position, au rôle et au pouvoir du CICR – celui-ci n’est qu’une institution privée’ (But – and this is where the ICRC’s legal status, and its role and power, are most often and most grossly misinterpreted – it is nothing but a private institution), ‘Le Comité international de la Croix-Rouge et l’assistance aux Allemands sous le coup de poursuites judiciaires’, RICR, no. 376, April 1950, pp. 260–70, esp. p. 262; ‘The ICRC is a private and independent institution, subject to no influence ...’, ‘The ICRC and the question of Koreans in Japan’, press release no. 676 of 13 March 1959, RICR, English supplement, vol. XII, no. 4, April 1959, pp. 85–6; ‘However, after examining the alarming report received from its delegate, the ICRC came to the conclusion that the relief action which should be undertaken clearly exceeded the capacity and the competence of a private institution such as the ICRC’, ‘The Red Cross action in the Congo’, IRRC, no. 10, January 1962, pp. 3–17, esp. p. 9; ‘The ICRC furthermore pointed out that as a private institution acting with complete independence, it never engages in an enquiry at the request of a government or a governmental organization’, IRRC, no. 221, March–April 1981, p. 101; ‘As a private and independent institution, the ICRC has
been entrusted by the international community with well defined functions...’, Annual Report 1984, p. 6, etc.
5 Ibid., p. 178.
6 Ibid.
7 Ibid.
8 Ibid., p. 179.
9 Ibid., p. 180.
11 Ibid., pp. 18–19.
12 Ibid., p. 33.
13 Ibid.
14 Ibid., p. 65.
15 Ibid., p. 73.
16 Ibid., p. 79.
17 Ibid., p. 80.
18 Ibid., pp. 104 and 137.
19 Ibid., pp. 133 and 137.
20 Ibid., p. 135.
21 Ibid., p. 173.
22 Ibid., p. 185.
23 Ibid., pp. 197, 202, 204, 206, 227, etc.
24 Minutes of the International Committee, vol. 4, session of 23 September 1870.
26 159th Circular to Central Committees, 15 August 1914, ibid., pp. 9–10.
30 Note from the International Committee of the Red Cross to the German government, 14 April 1917, ibid., pp. 43–4.
31 Letter from the International Committee of the Red Cross to the Governments of the Belligerent States, 2 September 1939, RICR, no. 249, September 1939, pp. 741–6.
35 ICRC Archives, file 201 (152); RICR, no. 455, November 1956, p. 659.
36 ICRC Archives, file 201 (65).
38 ICRC Archives, files 201 (43), 201 (171), 201 (174), 201 (124) and 201 (175).
39 Telegrams of 4 December 1971 to the governments of India and Pakistan, ICRC Archives, files 201 (66) and 201 (165); Notes to the Ministry of Foreign Affairs of the Republic of Iraq and the Ministry of Foreign Affairs of the Islamic Republic of Iran, 23 September 1980, ICRC Archives, files 201 (70) and 201 (71).
40 Notes to the Permanent Mission of Argentina and the Permanent Mission of the United Kingdom, 28 April 1982, ICRC Archives, files 201 (20) and 201 (52).
41 Note to the Permanent Mission of the United States and communications to the governments of the states taking part in the multilateral intervention force in Grenada, 26 October 1983, ICRC Archives, file 201 (234).
42 Notes to the Ministry of Foreign Affairs of the Republic of Iraq and to the Ministry of Foreign Affairs of the State of Kuwait, 2 August 1990, ICRC Archives, file 202 (214).


Resolution XXIV, ibid., p. 107.


Resolution VI, ibid., p. 151.


The resolution is entitled ‘Observer status for the International Committee of the Red Cross, in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949’ and reads:

The General Assembly,
Recalling the mandates conferred upon the International Committee of the Red Cross by the Geneva Conventions of 12 August 1949,
Considering the special role carried on accordingly by the International Committee of the Red Cross in international humanitarian relations,
Desirous of promoting co-operation between the United Nations and the International Committee of the Red Cross,
1 Decides to invite the International Committee of the Red Cross to participate in the sessions and the work of the General Assembly in the capacity of observer;
2 Requests the Secretary-General to take the necessary action to implement the present resolution.


‘… there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization ... are indeed governed by international law’. 'Report of the International Law Commission on the work of its twenty-sixth session, 6 May–26 July 1974 (Question of treaties concluded between States and International Organizations or between two or more International Organizations)', Yearbook of the International Law Commission, 1974, vol. II, part 1, United Nations, New York, 1975, Document A/CN.4/651/1974/Add.1 (Part 1), pp. 290–9, esp. p. 297. If the treaties concluded between the ICRC and an international organization are governed by international law, there is no reason why treaties concluded between the ICRC and a state should not also be so governed.
The ICRC’s legal personality in domestic law is expressly recognized by the headquarters agreements concluded on 7 July 1975 with Argentina, 1 April 1978 with Lebanon, 12 April 1980 with Mozambique, 19 May 1980 with Colombia, 12 September 1980 with El Salvador, 3 November 1980 with Nicaragua, 24 December 1981 with Ethiopia, 27 February 1982 with Zaire, 11 August 1983 with Somalia, 24 August 1983 with Costa Rica, 8 December 1984 with the Sudan, 16 February 1985 with Chad, 5 March 1985 with Chile, 30 April 1985 with the Philippines, 31 August 1987 with Honduras, 19 October 1987 with Indonesia, 29 December 1987 with Uganda, 19 June 1988 with Nicaragua, 5 June 1989 with Peru, 13 September 1989 with Guatemala, 16 July 1990 with Sri Lanka, 11 January 1991 with Tunisia, 5 March 1991 with Brazil, 10 May 1991 with Senegal, 24 June 1991 with Angola, 26 June 1991 with Namibia, 23 October 1991 with Fiji, 29 October 1991 with Kuwait, 14 April 1992 with Mali, 24 June 1992 with the Russian Federation and 19 March 1993 with Switzerland (ICRC Archives, file 250). The recognition in these agreements of the ICRC’s legal personality in foro domestico should be regarded as confirming the ICRC’s already existing legal personality, and not as conferring legal personality upon it. The inference would otherwise be that it has no such personality on the territory of states that have granted no such recognition, which is absurd.

At the risk of weakening its legal position, the ICRC has not always claimed these rights and privileges for its delegations. In fact, until fairly recently it had no definite policy on the matter, having always been more concerned with doing its job than with recognition of its status.


‘Only States may be parties in cases before the Court’ (Article 34, paragraph 1, of the Statute of the International Court of Justice).

Thus, the French government agreed to indemnify the ICRC for damage to ICRC trucks and relief supplies caused by the French bombing of Sakiet-Sidi-Youssef. The ICRC had decided not to claim reparation because the merely material damage to its property was insignificant
compared to the harm inflicted on the Tunisian inhabitants of that locality (ICRC Archives, Minutes of the ICRC Plenary Sessions of 13 February, 6 March and 1 May 1958).


62 Press release no. 1398, 16 September 1980.


65 Article 12 of the headquarters agreement concluded between the government of Cyprus and the ICRC, 28 March 1975, ICRC Archives, file 250.

66 ICRC Archives, file 250.


References

CHAPTER II

THE COMPOSITION OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

‘I know of no part of jurisprudence, or of human science, to which the institution calling itself the Geneva Committee can be assigned’, the renowned Russian jurist Fyodor Fyodorovich de Martens, legal adviser to the Imperial Russian Government, told the Fourth International Conference of Red Cross Societies which met at Karlsruhe in September 1887.1

No wonder he was puzzled, for although the International Committee has always been an international institution by reason of its activities and duties, its composition was – and still is – that of a private association under Swiss law. The International Committee is the continuation of the Committee of Five appointed by the Geneva Public Welfare Society on 9 February 1863. Ever since then, members who resign or die have been replaced by prominent figures chosen by the remaining members, so there has been no break in the International Committee’s already long history.

The Committee has called in reinforcements when its workload made this necessary. The number of its members increased from five to seven during the Franco-Prussian War of 1870–1; there were sixteen at the end of the First World War and twenty at the end of the Second World War. Since 1945 they have numbered between fifteen and twenty-three.

The members of the ICRC’s governing body have always been chosen from among Swiss citizens. At first this was only a practice, perhaps an accident, but for many years now it has been a statutory prescription. Article 7, paragraph 1, of the ICRC Statutes reads: ‘The ICRC shall co-opt its members from among Swiss citizens. It shall comprise fifteen to twenty-five members.’2 Article 5, paragraph 1, of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross (Geneva, October 1986), also provides that the ICRC ‘co-opts its members from among Swiss citizens’.3

On 1 January 2002, the International Committee had nineteen members, all of whom were Swiss.4

The practice of recruiting the International Committee by co-opting members from among Swiss citizens has guaranteed its neutrality, independence and continuity of action. But because of the international dimension of its attributions, many observers have found the practice anomalous and have put forward proposals to modify it.
The first such proposals came from the International Committee itself. In a communication to the First International Conference of Relief Societies for Wounded Soldiers, meeting in Paris in 1867, the International Committee stressed the need to bring its precarious situation to an end and to adapt its organization to the needs of the times, while placing it on a permanent footing.

In accordance with the principle that all the nations that rallied to the common cause should be represented on the Committee and have a legitimate share in its decisions, and anxious to uphold the principle of equality, the International Committee proposed to stand down in favour of a Conseil supérieur de l’œuvre, whose members would be elected by the various countries’ Central Committees in the proportion of one member for each military power. This international representation would be grouped around the Geneva Committee, which would act as its Bureau.\(^5\)

The Paris Conference merely touched upon this proposal, postponing consideration of it to a subsequent Conference.\(^6\) The Second International Conference, held in Berlin in 1869, confirmed the International Committee in its functions but deferred discussion of its composition to the next Conference, which was due to take place in Vienna in 1871.\(^7\)

The Geneva Committee, for its part, stood by the plan for its own reform that it had submitted to the Paris Conference, and continued to believe that it would not be truly international until it included representatives of the various nations’ Central Committees.\(^8\)

Optimism was in the air. Nobody imagined that such a trivial matter as war could disturb the sweet harmony which apparently reigned among the various countries’ aid societies. The Geneva Committee wrote in July 1870:

The essentially international feature of the societies under the aegis of the Red Cross is the spirit that moves them, the spirit of charity that causes them to come to the rescue wherever blood is shed on a battlefield, and to feel as much concern for wounded foreigners as for their own wounded countrymen. The societies constitute a living protest against the savage patriotism that stifles any feeling of pity for a suffering enemy. They are working to pull down barriers condemned by the conscience of our times, barriers that fanaticism and barbarity have raised and still too often strive to maintain between the members of a single family, the human race.\(^9\)

Disillusionment soon set in. A few days later the Franco-Prussian War broke out and the fledgling National Societies were at each other’s throats. The Societies of the belligerent states engaged in spreading the most poisonous propaganda, moved by the ‘savage patriotism’ that the International Committee had only lately denounced; and even some Societies of neutral countries did not hesitate to enter the fray. So violent were the recriminations and so deep the wounds that it took the International Committee thirteen years of patient effort to persuade the National Societies to meet again.

The verdict was conclusive: the National Societies were auxiliaries of their army medical services; they depended on the backing of their national
authorities and the support of public opinion; to muster the resources they needed for their work, they were obliged to appeal just as much to patriotism as to humanitarian feelings. They were too much a part of national life to be reasonably expected to stand aloof when their countries were fighting for survival.

That being so, an International Committee composed of representatives of the various nations’ Central Committees would certainly be paralysed just when it was most sorely needed.

This taught the Committee a lesson it had small chance of forgetting, for the same situation has arisen to a greater or lesser degree in every subsequent conflict up to the present day. Thus, when its composition was again discussed, this time at the Third International Conference of Red Cross Societies, held in Geneva in September 1884, the International Committee resolutely opposed the suggestions it had itself put forward at the Paris and Berlin Conferences.

The Conference was considering a proposal for reform submitted by the Central Committee of the Russian Red Cross. The discord between Red Cross Societies produced by the Russo-Turkish War of a few years earlier (1876–8) had convinced the St Petersburg Central Committee that the only way to strengthen ties between the Societies was to set up a central body formally recognized by all powers signatory to the Geneva Convention.

This went far beyond the question of the composition of the International Committee, and the Conference, believing that the Russian proposals were too radical to be usefully debated until the Central Committees had studied them and formed an opinion, postponed its study of them to a subsequent Conference.10

The decisive debate therefore took place at the Fourth International Conference of Red Cross Societies, held in Karlsruhe in 1887. Meanwhile the Central Committee of the Russian Red Cross had spelled out its conclusions, proposing the establishment of an International Committee of the Red Cross composed of members appointed by the governing bodies of National Societies, one member for each National Society.11 The Geneva Committee, for its part, advocated the maintenance of the status quo.12

The Russian proposals led to heated discussion. What was at stake was not only the composition of the International Committee, but also relations between Red Cross institutions, and more particularly the independence of the National Societies. The National Societies’ autonomy was guaranteed by the fairly loose structure instituted by the Constituent Conference of October 1863 and upheld by the Paris and Berlin Conferences. The Geneva Committee was not elected by the various Central Committees, and could therefore not claim to be of higher rank than they. It existed side by side with, and independently of, the National Societies from which it had received its mandate. It could make recommendations to them and tell them what it would like them to do, but had no right to give them orders. But obviously an International Committee composed of representatives of all the Central
Committees would *ipso facto* rank higher than the Central Committees and, once the Russian proposals were formally embodied in a diplomatic treaty as the St Petersburg Committee had suggested, the National Societies’ freedom of action would be a thing of the past.

The matter was referred to the Conference’s Third Committee. It concluded that the Geneva Committee should stay as it was, ‘having more duties than privileges, not having the exclusive monopoly in any aspect of the work of the Red Cross, but continuing to be the highest expression of its international action’.\(^\text{13}\)

The Russian Red Cross delegates, Counsellor d’Oom and Professor de Martens, drew attention to the ‘singular position’ of the Geneva Committee and to the fact that its authority rested only on the esteem in which its members were held, since there were no rules governing their appointment. It would, they said, have to be replaced by a truly international body, composed of representatives of the various Central Committees, whose authority would be formally recognized.

Gustave Ador, speaking for the Geneva Committee, simply pointed out that the Committee had never asked for wider powers, had not taken the initiative of asking for its rights to be more fully defined, and wanted the *status quo* to be maintained.

When put to the vote, the Russian proposal was defeated by a large majority.\(^\text{14}\)

Thus, after a debate that had occupied the attention of four International Conferences, the Geneva Committee found itself confirmed in its functions and composition. There seem to have been four reasons for this:

a) the illusory nature of attempts to regulate charitable activities;

b) the impossibility of converting to war conditions institutions intended to function in peacetime;

c) the independence that the National Societies had always enjoyed and were determined to retain;

d) the undeniable fact that the organization set up by the Constituent Conference of October 1863 had prospered beyond all expectations; it would have been irresponsible to change it for another form of organization that no one could be sure would work.

The composition of the International Committee was again discussed at the Sixth International Conference of the Red Cross, held in Vienna in 1897. The Central Committee of the Russian Red Cross had submitted a report suggesting that a penal sanction be incorporated in the Geneva Convention. The report proposed sanctions on both the national and the international levels. On the national level, each state party to the Geneva Convention would be required to adopt a penal law enabling it to repress breaches. On the international level, the Geneva Committee would investigate alleged breaches and settle any differences that might arise between the belligerents in this regard. For that purpose, the composition of the Geneva Committee
would be modified to make it truly representative of the various countries’ Central Committees.

This proposal was fiercely opposed. One after another the delegates of the states party to the Geneva Convention took the floor, declaring that their governments would never agree to supervision by neutral delegates appointed to investigate alleged breaches. When the Russian proposal was put to the vote, it received no support at all.\textsuperscript{15}

Nothing daunted, at the First Hague Peace Conference of 1899 the St Petersburg government proposed

‘the creation of an ‘International Red Cross Bureau’, recognized by all the Powers and established on the principles of international law, in order to settle all questions regarding volunteer medical assistance and relief during war \ldots \textsuperscript{16}

The Conference rejected this proposal on the grounds that reorganization of the Red Cross was not on its agenda.\textsuperscript{17}

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The founding of the League of Red Cross Societies just after the First World War should not perhaps be seen as a new attempt to modify the composition of the International Committee, but it was at least an attempt to transfer most of its tasks and powers to a multilateral institution.

Aware that converting the Red Cross to peacetime activities, and especially reconstruction work, made greater co-operation between National Societies necessary, the International Committee had itself considered broadening its composition.\textsuperscript{18} But when Henry Pomeroy Davison, President of the War Council of the American Red Cross, led the National Societies of the Major Allied and Associated Powers (the United States, France, Great Britain, Italy and Japan) in forming an ‘International Committee of Red Cross Societies’, the Geneva Committee felt threatened. It became all the more uneasy when Davison called a Constituent Conference in Cannes without waiting for the International Conference of the Red Cross which the ICRC had announced it was about to convene.

The League and the International Committee were profuse in expressions of harmonious co-operation and fraternal understanding, but the differences between them were deep and very real.

The League was founded outside the framework of the International Conference of the Red Cross. Its first Statutes,\textsuperscript{19} adopted in Paris on 5 May 1919, gave the five founding Societies a dominant position and authorized them to exclude permanently the National Societies of the former Central Powers (Germany, Austria, Hungary, Bulgaria and Turkey) as well as the Russian Red Cross. This ran counter to two basic principles of the Red Cross: universality, and the equal status of National Societies. The League’s founders intended the new institution to become the real centre around which
co-operation among National Societies would be organized. They lost no
time in expressing their profound respect for the International
Committee but, just as certainly, they saw no obvious place for it in the new
scheme of Red Cross international relations. Without saying so openly, they
wanted the Geneva Committee to have merely a mere honorary status that would
soon have reduced it to a ‘museum piece’.  

There would be no more war, for the victors had decided as much and the
newly founded League of Nations was there to prevent it. Therefore the role
of neutral intermediary, until then the recognized attribute of the
International Committee, was, like war itself, merely a legacy of the past and
better forgotten.

For its part, the International Committee took the view that only an
International Conference of the Red Cross attended by all duly recognized
National Societies was entitled to adopt a new scheme of organization for
Red Cross international relations. The Committee upheld the Fundamental
Principles proclaimed at the very founding of the Red Cross. It had no inten-
tion of abandoning the special relationship it had fostered with the National
Societies ever since and wanted to continue to play an active part in an insti-
tution which it had initiated. The experience of more than half a century had
taught it that its universally recognized role of neutral intermediary was
useful and, as the Great War had just shown, important. It felt that the
scourge of war could not be abolished by decree, and that the flaws in the
Covenant of the League of Nations were too obvious not to give rise to
misgiving.

The dissension between the International Committee and the League was
thus fundamental, and had nothing to do with differences of temperament,
to which it was somewhat glibly ascribed. So, when there were calls from
all sides for the two bodies to merge, each felt that its existence was
threatened.

Laborious negotiations followed. They lasted more than eight years and
occupied the attention of four International Conferences of the Red Cross.
All proposals put forward for the merger or organic union of the two bodies
were discarded one after the other. The League’s member Societies insisted
that they should be represented in the decision-making organs of the new
institution, to ensure that they would have a legitimate share in its decisions,
while the International Committee was still convinced that its neutrality and
independence – and therefore the fulfilment of its mission – depended on the
system of co-opting its members.

This is not the place for a detailed account of these difficult negotiations,
during which both sides made serious blunders. Having explored in vain all
possibilities of a merger, they concluded that the ICRC and the League
should continue to exist as mutually complementary organizations. No
attempt should be made to amalgamate them into a single body; each of them
should be assigned a well-defined field of activity, while both would be
included in a larger institution, the International Red Cross.
Such was the purpose of the draft Statutes of the International Red Cross, drawn up by Colonel Paul Draudt, Vice-President of the League, and Professor Max Huber, a member of the ICRC’s governing body. The draft was adopted by the Thirteenth International Conference of the Red Cross, held in The Hague in October 1928.

Thus, after nearly ten years of argument, the International Committee was confirmed in its functions and composition.

The International Committee was the butt of ironic comment about the way it had defended its traditional position at the end of the First World War, instead of bowing to the gale of idealism unleashed by President Wilson which seemed to bear the League towards the enchanted shores of a future free from the threat of war. But history has vindicated the International Committee, not its detractors. Throughout the Second World War, owing to the very nature of its membership, the League was unable to undertake relief work for civilians in occupied Europe on its own, since most of its senior officials belonged to countries that were at war with Germany, and the German government would not sanction any action by the League in territories occupied by the Axis. It was only through the Joint Relief Commission of the International Red Cross that the League was able to help the civilian population. Moreover, the international organizations depending on the League of Nations were, like the League of Nations itself, unable to take any action whatsoever.

In spite of the extraordinary development of its activities during the Second World War, at the end of the war the International Committee found itself in the dock. When the Nazi concentration camps were thrown open and the fate of Soviet prisoners of war was made known, all that the ICRC had done for other victims was forgotten. Some of its critics went so far as to demand that the International Committee be purely and simply abolished and its responsibilities transferred to the League, which was completely dominated by the victorious nations.

Others, while not calling for the ICRC to be dismantled, attacked its composition, working methods and mission, as did Count Folke Bernadotte, President of the Swedish Red Cross, in the proposal he submitted to the Preliminary Conference of Red Cross Societies, meeting in Geneva on the initiative of the ICRC from 26 July to 3 August 1946.

Count Bernadotte, after paying tribute to the International Committee’s work during the war, said that he was sure

that the results arrived at ... might have been, and could be, infinitely greater if the Committee possessed still greater authority, by the mere fact of its being the direct representative, in time of peace, of the Red Cross Societies of all the countries in the world and, in time of war, that of all the neutral countries".

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In his view, the members of the International Committee could belong to countries other than Switzerland and should be elected by the International Conference of the Red Cross. In the event of war, all members belonging to belligerent countries would be replaced by citizens of neutral countries. Since it was the duty of the International Committee to monitor the application of the humanitarian rules, it had to be as strong and representative as possible.

Count Bernadotte’s proposals were inspired by the conviction, already expressed during the Karlsruhe Conference sixty years previously by Counsellor d’Oom and Professor de Martens, that the International Committee’s authority would be more highly respected if recruitment of its members were more broadly based. But by suggesting that in the event of war members of the International Committee belonging to belligerent states would be replaced by nationals of neutral countries, he hoped to forestall the objection that had led to the rejection of the Russian Red Cross proposals, namely that the International Committee would be hamstrung by quarrels among members belonging to the warring parties.

These proposals were attractive. They relied implicitly on the very great credit enjoyed by the Swedish Red Cross and its President owing to their humanitarian activities during the Second World War. On closer examination, however, they raised more difficulties than they could resolve, being based on a confusion between three completely different situations. The first of these is permanent neutrality, that is, the status of a country bound to perpetual neutrality by treaties that oblige other states to respect its territory as inviolable. The second is occasional neutrality, whereby a state chooses to stay neutral in a given conflict while reserving the right to act differently in another conflict. The third is non-belligerence, whereby a state abstains, perhaps for only a short time, from taking part in active hostilities, but does not consider itself bound by the obligations imposed by the law of neutrality, and reserves the right to enter the fray when it pleases. However, it was clear from the example of Italy between September 1939 and June 1940, and of the United States until November 1941, that the presence of nationals of non-belligerent countries on the International Committee would paralyse its work and make it impossible for it to convince the outside world that it was neutral and impartial. Furthermore, the obligation at the beginning of and during each conflict to appoint nationals of neutral states to replace members belonging to nations drawn into the war meant that the composition of the International Committee would have to be modified at the very time when its action was most needed. The Canadian Red Cross delegate was hardly exaggerating when he conjured up the image of a ‘kaleidoscopic organization’ whose composition was constantly changing. In any event, an International Committee so composed would lack the primary requisite for effective action, namely stability.

It is hardly surprising then that Count Bernadotte withdrew his proposals soon afterwards.
The composition of the International Committee was not called into question at the 1949 Diplomatic Conference or at the more recent Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–7), but on both occasions it was proposed to transfer part of the Committee’s responsibilities to a multilateral institution.

The French delegation at the 1949 Diplomatic Conference expressed the fear that the protection the Conventions were designed to offer would be inoperative in any future world war because there would be no neutral states in a position to perform the tasks required of Protecting Powers. It therefore proposed the establishment of a ‘High International Committee for the Protection of Humanity’, made up of thirty eminent political, religious and scientific figures, leading members of the legal profession and holders of the Nobel Peace Prize, elected by an assembly of delegates of all the states signatory to the Geneva Conventions. In situations where no Protecting Power had been appointed, this High Committee would perform all the tasks normally assigned to Protecting Powers by the Geneva Conventions.30

Although the French delegates took care to point out that the proposed High Committee would not duplicate the International Committee, their proposal would nevertheless transfer much of the ICRC’s work to a multilateral organization.

The idea was greeted with extreme scepticism. Its critics pointed out the difficulty of forming a committee of members from different states, possessing all the necessary qualifications and able to work effectively.31 There was also the objection that this International High Committee – whose members would have to be recognized and accepted by all states – would be an artificial body, for its members would ‘therefore be in some way outside and superior to the existing world’.32 In the end, when the French delegate said, in reply to the question as to where this august humanitarian assembly would meet if there were no more neutral states, that ‘it could meet on a piece of internationalized territory, or on several such territories in different parts of the world’,33 it became clear that this was mere word-play and that the whole scheme was a fantasy rather than a realistic weighing up of possibilities.

Finally the Conference adopted a resolution recommending that

consideration be given as soon as possible to the advisability of setting up an international body, the functions of which shall be, in the absence of a Protecting Power, to fulfil the duties performed by Protecting Powers in regard to the application of the Conventions for the Protection of War Victims.34

It was up to France to take steps to put this resolution into effect and the Quai d’Orsay began consultations in 1950. It received so few replies that it was clear that other countries were not interested,35 and after a brief exchange of correspondence this resoundingly named but impractical project was dropped.
At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, several delegations proposed that the Protecting Powers’ monitoring of compliance with humanitarian rules, which relies on the consent of the belligerents, should be supplemented by an automatic procedure entirely independent of the parties’ consent. The proposal envisaged that the United Nations could either act as a substitute in default of Protecting Powers or appoint an organization of its choice to act in their stead.

That was the gist of a draft amendment, presented by Norway and the Arab States, which proposed to add the following provision to draft Article 5 of Protocol I relating to the appointment of Protecting Powers and their substitutes:

If the discharge of all or part of the functions of the Protecting Powers, including the investigation and reporting of violations, has not been assumed according to the preceding paragraphs, the United Nations may designate a body to undertake these functions.36

Given the similarity between the duties of the Protecting Powers and those of the ICRC, had this proposal been accepted it would have transferred to a multilateral organization part of the tasks normally falling to the International Committee.

In support of the amendment it was argued that a supervisory body which would not depend on the consent of the parties was necessary to monitor compliance with humanitarian law, and that the United Nations should be assigned powers in this regard.

The opponents of the amendment objected that it imposed an unacceptable constraint and interfered with the existing system of Protecting Powers, which was based on the parties’ consent. They felt that responsibility for monitoring the application of the humanitarian treaties could not be handed over to a political institution, and that this role was incompatible with the responsibilities for maintaining peace which are entrusted to the United Nations by its Charter.37 The United Nations observer informed the meeting of his organization’s reservations in this regard, pointing out that the UN Charter, the sole source of the powers of the United Nations and its organs, did not give the organization any responsibility for monitoring the application of humanitarian law.38

When put to the vote the draft amendment was rejected, with twenty-seven votes in favour, thirty-two votes against and sixteen abstentions.39

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Thus ever since the International Committee was formed there have been proposals either to modify its composition or to transfer all or part of its duties and powers to a multilateral organization. These have been made repeatedly, indeed almost continually. They have been debated in depth and usually with
some vigour. Yet every time the International Committee has been confirmed in its tasks and composition.

Not without good reason. Although the International Committee has been assigned definite tasks in promoting compliance with the Geneva Conventions and their Additional Protocols, and has had to set up quite a large administrative structure to cope with its expanding activities, it is still primarily a relief organization. Even when its action is based on international conventions, the nature of that action is not judicial but voluntary and charitable. Charity, however, cannot be regimented. It would be fatal to try to confine it in a strait-jacket of rigid regulations and complicated procedure. ‘The fewer rules there are for voluntary relief, the better it will work’, as Paul des Gouttes said.40

An International Committee composed of representatives of various countries, not all of them on good terms with each other, would inevitably have to have precise and detailed rules of procedure that would make any spontaneous charitable activities impossible.

As it is composed at present, the International Committee is, so to speak, concurrent with and independent of the National Societies; it does not emanate from them. Matters would be very different if it were made up of representatives of all the National Societies, for its very composition would then suffice to rank it above each individual National Society. The question of the composition of the International Committee is, then, largely inseparable from the question of international Red Cross organization and, more particularly, the independence of the National Societies.41 In this connection, there is one decisive fact whose importance was clearly recognized by the Karlsruhe Conference of 1887, namely that the National Societies came into being before the international organization of the Red Cross. They were founded as the Belgian, French, Dutch or Prussian Red Cross Societies, and not as branches of a pre-existing international organization. Only later, once they were well established, did they feel the need to come together and formulate more detailed rules to supplement the few general principles contained in the Resolutions and Wishes adopted by the Constituent Conference of October 1863. But by the time the Paris and Berlin Conferences were held, in 1867 and 1869 respectively, the National Societies were enjoying a great deal of freedom and were not prepared to renounce it. Changing the composition of the International Committee to include representatives of all the National Societies, as Counsellor d’Oom and Professor de Martens had proposed at the Karlsruhe Conference, would have meant sacrificing much of the independence that the National Societies had enjoyed ever since the Red Cross was founded. And who, having tasted freedom, would willingly give it up?

Recruitment of members of the International Committee’s governing body by co-opting them from among Swiss citizens is a guarantee of cohesion and efficiency. Its members have attended the same schools, and often share the same background – the liberal professions, or higher education; they think
along the same lines, and can identify themselves with the institution much more easily than would eminent figures from different parts of the globe. And since they do not represent any state or party, they are responsible only to the Committee itself and to their own conscience. They have no constituency to which they are answerable for their activities and for the opinions they express within the ICRC. In fact, despite the momentous nature of their decisions, the vast majority of them are taken not by vote but by consensus emerging from discussion. The International Committee has never reached a deadlock because its members failed to agree.

This method of recruiting members also offers an invaluable guarantee of the confidentiality of information, and therefore of the institution’s acceptability. There can be no doubt that considerable pressure would be brought to bear on Committee members of different nationalities to inform their respective governments of the International Committee’s activities and of the findings of its delegates. If its composition were to be modified, would the ICRC be in a position to give parties to a conflict the assurances of confidentiality which are necessary for the major part of its activities, especially visits to places of detention? Probably not.

The composition of the International Committee is also the most effective guarantee of its independence, for states and National Societies take no part in recruiting its members, and the latter follow no instructions from any state or party in carrying out their duties. They represent nobody but themselves and their decisions are completely independent. Obviously, if they were appointed by the Central Committees of National Societies they would be answerable to their respective Societies and would have to do as they were told.

Recruitment of members of the International Committee by co-opting them from among Swiss citizens also ensures that the Committee is neutral and therefore acceptable. Switzerland obviously has no monopoly on neutrality, but Swiss neutrality is founded on tradition and on treaties which give it special status. Moreover, Switzerland has been spared war for almost two centuries, so has no real enemy. *A priori*, no belligerent party can reasonably fear that the International Committee will not treat it impartially; but what belligerent would trust the ICRC if one of its members were an enemy?

Those who advocate changing the composition of the International Committee have generally pointed to the example of the international organizations and their secretariats. This is a false analogy, for such organizations do most of their work in peacetime, and it is unrealistic to expect that peacetime methods of organization can be applied in times of armed conflict. Indeed, multilateral organizations do not run smoothly even at the best of times. It needs no great acumen to foresee that, if the International Committee included representatives of belligerent nations, it would itself become a battlefield and its work would inevitably be brought to a halt by its members’ quarrels. This is not mere supposition; all too many debates at the
United Nations, and the dispute over the representation of the Republic of South Africa that arose at the Twenty-fifth International Conference of the Red Cross, held in Geneva in October 1986, have shown clearly enough that it is always difficult, and in many cases impossible, to get representatives of nations who are at loggerheads to come together around a conference table.

However logical it may seem that international missions should be carried out by a multinational organization, there is one obvious exception. The International Committee has been in existence, and active on the international scene, for more than 130 years. Its work has expanded beyond all possible expectations. It has had serious setbacks but has indisputably done its work with unparalleled efficiency. In its own domain, it has acquired experience unrivalled by that of any other institution. Its basic working principles have remained unchanged; this is the best gauge of its impartiality, the continuity of its action, and therefore its acceptability. It would, to say the least, be rash to try to replace it with a different system that nobody could be sure would work. Whether or not its position is anomalous, the International Committee’s record and the services it has rendered have always been an argument for maintaining it as it is.

There remains the alternative proposed by Count Bernadotte, namely that the International Committee would be composed of representatives of the various nations, on the understanding that in the event of war its members from belligerent nations would be replaced by nationals of neutral countries. To start with, it is not clear nowadays what the term ‘belligerent’ means. If belligerence depends on a declaration of war, the United States was not a belligerent in the Vietnam War, and the Soviet Union was not a belligerent in the Afghan conflict. During the 1962 conflict between China and India, and the 1979 conflict between China and Vietnam, diplomatic relations were not even broken off. It is easy to imagine the differences that would arise if some members of the Committee belonged to nations engaging in hostilities without a declaration of war. They would refuse to resign, on the pretext that their countries were not formally at war, but they would nevertheless be representatives of belligerent nations. Obviously, once the first shots had been fired and casualties were coming in, all sorts of pressure would be applied to influence the appointment of new members. The war would be over before the International Committee had even started work.

Thus, although purists may object that because of the Committee’s international attributes it is illogical to recruit its members by co-opting them from among Swiss citizens, this is in the last analysis the best possible system imaginable in the present state of international relations. And it has one tremendous advantage: it works.

It is also the best possible guarantee of the International Committee’s independence and neutrality, and of the continuity of its action.42
Notes

1 Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Carlsruhe du 22 au 27 septembre 1887, Compte rendu, p. 95.


3 Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross, Geneva, October 1986, Article 5, paragraph 1, IRRC, no. 256, January-February 1987, pp. 25–59, esp. p. 32; Handbook of the International Red Cross and Red Crescent Movement, thirteenth edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, p. 422. The rule stating that members of the ICRC shall be co-opted from among Swiss citizens already appeared in the Statutes of the International Red Cross adopted by the Thirteenth International Conference of the Red Cross, The Hague, 23–27 October 1928, Treizième Conférence internationale de la Croix-Rouge, Compte rendu, pp. 182–6, esp. p. 184. Thus the rule was introduced into the Statutes of the International Red Cross before it appeared in those of the ICRC.

4 The members of the International Committee are listed inside the cover page of every issue of the International Review of the Red Cross.


8 Ninth Circular to Central Committees, 21 September 1867, Actes du Comité international de Secours aux Militaires blessés, pp. 79–82; Eleventh Circular to Central Committees, 30 March 1868, ibid., pp. 87–8; Note addressed to the Central Committees, 20 June 1868, ibid., pp. 94–109.


12 Ibid., pp. 22–4.

13 Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Carlsruhe du 22 au 27 septembre 1887, Compte rendu, p. 90.


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17 Ibid., pp. 2–3.
20 On 25 February 1923 Sir Arthur Stanley, Chairman of the British Red Cross Society, wrote to Prince Charles of Sweden, President of the Swedish Red Cross, as follows: ‘Yet to me it would seem fair to reserve a place for the members of the ICRC so that the new organization might benefit from their experience, from an endeavour that has continued without interruption for 60 years, and to offer this venerable institution the place of honour which it deserves’, ICRC Archives, file CR 113; Xle Conférence internationale de la Croix-Rouge, Réorganisation de la Croix-Rouge internationale: Rapport et documents concernant les pourparlers entre le Comité international de la Croix-Rouge et la Ligue des Sociétés de la Croix-Rouge, juillet 1922–juillet 1923, publié par le Comité international de la Croix-Rouge (Document no. 37), ICRC, Geneva, July 1923, pp. 79–82, esp. p. 81; André Durand, History of the International Committee of the Red Cross: From Sarajevo to Hiroshima, Henry Dunant Institute, Geneva, 1984, pp. 177 and 183–4.
25 The Joint Relief Commission of the International Red Cross was a joint ICRC-League body formed in July 1941 to carry out relief operations for civilians affected by the war. For the activities of this body, see the Report of the Joint Relief Commission of the International Red Cross, 1941–1946, ICRC-League, Geneva, 1948; and Book I, Chapter VIII, Section 8, above, pp. 222–5.
26 Speech by Count Folke Bernadotte, President of the Swedish Red Cross, Geneva, July 1946 (cyclostyled), ICRC Archives, file CR 109b; Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross (Geneva, July 26–August 3, 1946), ICRC, Geneva, January 1947, p. 120.
27 In the words of Dr Gustave Adolphe Bohny, President of the Swiss Red Cross, ‘… if we want to work effectively in wartime, it is quite a risk to propose an organization whose composition would have to be changed the moment war broke out’. Conférence préliminaire des Sociétés nationales de la Croix-Rouge pour l’étude des Conventions et de divers problèmes ayant trait à la Croix-Rouge, Procès-verbaux (cyclostyled), vol. IV, meetings of Commission III, p. 83 (meeting of Tuesday, 30 July 1946).
28 Ibid., p. 79.
29 ‘My proposal resulted in lengthy and lively discussions. A special committee was formed which met frequently. In the course of these meetings I greatly revised my original attitude toward the problem … In short, I have become convinced that the International Committee ought to continue in its present form and retain its present composition…’, Folke Bernadotte, Instead of Arms, Hodder and Stoughton, London, 1949, pp. 129–31 and 163–6, esp. p. 130; Ralph Hewins, Count Folke Bernadotte, His Life and Work, Hutchinson & Co., London, 1949, pp. 171–3 and 175–9.
32 Ibid. (statement by Sokirkine).
33 Ibid., pp. 92–3 (statement by Cahen-Salvador).
36 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977), Federal Political Department, Berne, 1978 (hereinafter Official Records CDDH), vol. X, p. 69 (Doc. CDDH/I/235/Rev.1, Report to Committee I on the work of Working Group A). This draft amendment was the result of the merger of two draft articles: Amendment CDDH/I/75, proposed by the Arab States, and Amendment CDDH/I/75, proposed by Norway, Official Records CDDH, vol. III, pp. 31 and 35. There is no intention to offer an opinion here as to whether it is any part of the Protecting Powers’ mandate to investigate and report on breaches of the Geneva Conventions, as the authors of these amendments claimed, but there is room for doubt.
41 The only independence referred to here is that of the National Societies at the international level, in other words each National Society’s independence vis-à-vis all other Red Cross or Red Crescent institutions. A National Society’s independence of the government of its country is an entirely separate matter that has nothing to do with the composition of the International Committee.
42 It has sometimes been said that the International Committee’s governing body should be composed of members representing the different regions of Switzerland. This is absurd; if the Committee were to be representative of anything at all, it would have to be of the world’s various continents, leading cultures and main legal systems. If the principle of equitable geographical distribution and representation of major civilizations is set aside for the sake of efficiency, there is no reason to try to reinstate it by requiring equitable representation of the different parts of Switzerland. The only criteria that should be taken into account, therefore, in the recruitment of members of the International Committee are – apart from the qualities of integrity and independence – the value of the opinions and advice they can offer, the value of the network of relations they can place at the service of the institution, an open-minded attitude to the outside world and a wide experience of international affairs. The last two features are indispensable to counterbalance the fact that the Committee members are all Swiss citizens and to ensure that the institution does not become cut off from the rest of the world. On the other hand, the fact that the canton of Vaud or of Graubünden is or is not ‘represented’ within the ICRC has no bearing whatsoever on the effectiveness of its work. The same applies to political parties, trade unions, churches and associations. This is one sphere in which the intricate balance of Swiss politics has no place.

References
As far as I know, there is no study covering this subject.
CHAPTER III

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND SWITZERLAND

What are the relations between the ICRC and Switzerland?

The very question is an acknowledgement that they are probably not identical to those of the ICRC with other states. The International Committee of the Red Cross has its headquarters in Switzerland and recruits its members from among Swiss citizens. The Swiss Federal Council is the depositary of the Geneva Conventions and their Additional Protocols. The ICRC and Switzerland are therefore linked by special ties which merit explanation. It would be futile and patently untrue to claim that the ICRC’s relations with Switzerland are no different from its relations with any other state.

It would be equally wide of the mark to claim that the International Committee is a mere instrument of Swiss diplomacy and that both expressions of the equation are therefore identical. In public international law the ICRC not only has a legal personality that is distinct from that of Switzerland, but also the capacity to take decisions independently of Swiss political power. Admittedly the International Committee has never come into open conflict with the Swiss authorities, but on several occasions the ICRC and the Swiss Confederation have not seen eye to eye. To take only one example, which although not recent clearly shows that the ICRC is independent of the Swiss authorities: after the October Revolution and the general strike that paralysed Switzerland in November 1918, in which a large sector of Swiss public opinion saw the hand of Moscow, and after Swiss assets in Russia were confiscated and the Swiss Legation in Petrograd was sacked, Switzerland obstinately refused to enter into diplomatic relations with the Soviet Union. In September 1934 it opposed the admission of the USSR to the League of Nations; and five years later the Swiss Federal Council welcomed the decision of the Council of the League of Nations to expel the USSR when it invaded Finland. Switzerland persisted in its cold-shoulder policy long after the battle of Stalingrad. It was not until the Soviet Union emerged from the Second World War as a great power on the road to victory, and as one of the states that would dominate the European scene and the post-war world, that Switzerland ceased to stand aloof and at last sought contact.

The ICRC’s attitude was quite different. Anxious to preserve the unity and universality of the Red Cross movement and help in the rebirth of the Russian Red Cross, it appointed a delegate to Russia as early as April 1918, and when he was declared persona non grata was tireless in its efforts to
install another delegate in his place. Voldemar Wehrlin represented the ICRC in Moscow from October 1921 to June 1938, when it regretfully withdrew him, mainly because of financial constraints. It furthermore recognized the Red Cross Society of the Russian Soviet Federated Socialist Republic in October 1921, and all through the Second World War tried to resume contact with the Soviet government and the Alliance of Red Cross and Red Crescent Societies of the USSR. Thus, whereas the Swiss Federal Council was refusing to enter into official relations of any kind with the Soviet Union and wanted it ostracized everywhere, the International Committee sought to establish a dialogue with it and maintain a presence there, not out of any fondness for the Bolshevik regime but in accordance with the principles it was itself duty bound to uphold. This example – and many more could be given – will suffice to show that the ICRC is able to take independent decisions, and where necessary to adopt policies very different from those of the Swiss Confederation.

It follows that both extreme answers to the initial question – namely that the ICRC’s relations with Switzerland are no different from its relations with any other state, or alternatively that the ICRC is merely the Swiss Confederation’s humanitarian showcase – must be rejected. There is, then, a special relationship between the ICRC and Switzerland, which must now be examined.

The special ties between the ICRC and Switzerland are of several kinds – personal, legal, financial, operational, diplomatic and symbolic.

Since the ICRC recruits the members of its governing body from among Swiss citizens, there is a personal link between it and the Confederation in that all Committee members are of Swiss nationality. This has undoubtedly made for good relations between it and the country in which its headquarters is located, but does not impair the ICRC’s independence, for the Swiss authorities take no part in their recruitment. The members of the International Committee are neither active in politics nor government officials employed by the Confederation or by a canton. They certainly do not represent either their canton of origin or a party, church or association. They are co-opted by the existing members and cannot be removed from office except by their peers.

Established as a private association with its headquarters in Switzerland, the ICRC is subject to Swiss law, notably Article 56 of the Swiss Federal Constitution and Articles 60ff. of the Swiss Civil Code, already mentioned. This poses no threat to the International Committee’s independence, for the purpose of these provisions is precisely to guarantee freedom of association. Moreover, the Swiss Federal Council undertook in its declaration of 25 November 1958 to ‘do all in its power to enable the International Committee of the Red Cross to fulfil its mission and maintain its independence’. Since this declaration was freely given, it stands to reason that the Federal Council can revoke it whenever it is so inclined, but the indications
are that it is not entirely free to do so, for as a state party to the Geneva Conventions and their Additional Protocols Switzerland would contravene its own obligations if it were to prevent the ICRC from performing the tasks entrusted to it by those treaties.

Since its headquarters are in Switzerland and it recruits its members there, the International Committee participates in Swiss neutrality to an extent which must be specified. Like any other legal entity established in Switzerland, it may be subjected to any regulations the federal authorities may have to adopt to ensure respect for Swiss neutrality, but it also benefits from Swiss neutrality in conducting its humanitarian activities. This is undoubtedly one of the salient features of the ICRC’s relations with Switzerland and therefore merits further consideration.\(^\text{13}\)

The ICRC’s neutrality has long been identified with Swiss neutrality, just as Red Cross neutrality has often been identified with neutrality in international law. The use of the same term in both cases has led people to think that the concept considered is also the same, but this is not necessarily true.

A neutral state has four basic legal obligations:

a) *a duty of abstention*: a neutral state must refrain from taking part in hostilities unless it is itself the victim of aggression;

b) *a duty of impartiality*: a neutral state must not favour one belligerent to the detriment of the other, and any legislative measure taken by it to restrict or prohibit the export of war material must be applied by it in uniform manner to all belligerents;

c) *a duty of prevention*: a neutral state may not tolerate the use of its territory as an operational base by one of the belligerents; it must oppose the passage of troops or convoys across its territory and prevent wireless telegraphy stations, other means of communication or recruiting agencies, etc., from being installed there;

d) *a duty of tolerance*: a neutral state must allow belligerents to exercise belligerent rights against it, such as the rights of stoppage, search and capture of its merchant vessels within the limits prescribed by international law.\(^\text{14}\)

In return, belligerents are bound to respect the inviolability of the territory of neutral states. They are forbidden to move troops or convoys across such territory, or to install there means of communication, corps of combatants or recruiting agencies, and so on.

The law of neutrality applies only in the event of war.\(^\text{15}\) However, a perpetually neutral state such as Switzerland must take care not to enter into any commitment in peacetime that might prevent it from discharging in time of war the obligations imposed on it by its neutral status.\(^\text{16}\)

A perpetually neutral state must in particular refrain from taking part in military alliances or political or economic agreements that would prevent it from fulfilling its duty of impartiality. It must not permit foreign military bases to be established on its territory, and it must maintain a state of military preparedness that will enable it to repel violations of its neutrality.
Yet a neutral state is under no obligation to refrain from having an opinion and making it known. For example, in the Second World War Nazi Germany repeatedly asserted that the law of neutrality required Switzerland to observe moral as well as military and political neutrality. That would have barred the Swiss government, the Swiss press and public opinion from expressing any sympathy with the enemies of the Reich. Switzerland never accepted this point of view.17

As history shows, the ICRC’s neutrality is an offshoot of Swiss neutrality. This was recognized by the First International Conference of Societies for the Relief of Wounded Soldiers, held in Paris in 1867, at which Count de Bréda, delegate of the French Central Committee, was so sure that Paris was the European capital of enlightenment and progress and had advantages and facilities far beyond the reach of Geneva that he proposed transferring the headquarters of the International Committee from Geneva to Paris.18

The conference unhesitatingly rejected the proposal in the following terms:

In the opinion of the conference the headquarters of the International Committee should remain in Geneva. The geographical situation of this city, the political neutrality of Switzerland to whom it belongs, no less than historical tradition and awareness of a duty to the founders of the undertaking seem to be the deciding factors.19

It is perfectly clear that the role of neutral intermediary intended for the International Committee was based on the assumption that its headquarters should be in a small neutral country. Not only did the Vienna Declaration of 20 March 1815 and the Treaty of Paris of 20 November 1815 both guaranteed Switzerland’s perpetual neutrality,20 but the signatory states had recognized ‘that Swiss neutrality and inviolability, and its independence from any foreign influence, are in the true interests of the policy of the whole of Europe’.21 Had the ICRC been formed on the territory of a great power, it would inevitably have become its plaything and would have been paralysed in time of war.

This does not mean, however, that the ICRC’s neutrality is indistinguishable from that of Switzerland; it differs from Swiss neutrality in its legal basis, its aims and the content of the rules that define it. The legal position of a neutral state such as Switzerland is governed by customary law and various international treaties, in particular the Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907, and the Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, of the same date.22 The neutrality of the ICRC is based on its own continuous and uniform practice and the international community’s recognition thereof, and on the Fundamental Principles of the Red Cross and Red Crescent, proclaimed by the Twentieth International Conference of the Red Cross, held in Vienna in October 1965,23 and confirmed by the Twenty-fifth Conference, held in Geneva in October 1986.24
Switzerland regards its neutrality as a means of preserving its unity and independence. The Red Cross, and especially the ICRC, regard neutrality as an essential condition for their activities. To carry out its relief operations and the tasks entrusted to it, the Red Cross must refrain from taking sides or favouring one belligerent to the detriment of another.

The law of neutrality applies only in time of war. Switzerland’s perpetual neutrality imposes some obligations on it both in peace and in war, but their purpose is solely to preserve its neutrality if war breaks out. For the Red Cross, however, neutrality is a permanent duty which it can never neglect, even briefly, without jeopardizing its ability to help victims of conflicts. It is binding upon every member of the International Red Cross and Red Crescent Movement, and above all the ICRC, because of its unique position and the role of intermediary that has been assigned to it.

The obligations of neutral states under the law of neutrality are primarily military ones. Neutral states must refrain from taking part in hostilities or from giving military support of any kind to any belligerent. A perpetually neutral state must never enter into any political or economic commitment that in wartime would prevent it from fulfilling its obligations. Otherwise it has complete freedom of action. There is nothing to stop it from voicing its opinion, and states that are by tradition neutral, such as Switzerland, Sweden and Austria, have not failed to exercise this right. In contrast, the Red Cross may not take part in any controversy. The principle of neutrality proclaimed by the Twentieth International Conference of the Red Cross (Vienna, 1965) and confirmed by the Twenty-fifth Conference (Geneva, 1986), rules that:

In order to continue to enjoy the confidence of all, the [International Red Cross and Red Crescent] Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.25

State neutrality consists primarily in a duty of abstention. Although since the Second World War Switzerland has largely pursued a policy of active neutrality marked by readiness to lend its good offices and show solidarity with war-torn countries, Swiss neutrality is still basically an attitude of restraint. In contrast, the neutrality of the Red Cross means that it is equally ready at all times to help all victims of conflicts. It never stands aloof, but is open to dialogue with any belligerent.

Thus, even though the ICRC’s neutrality is founded upon Swiss neutrality, its legal basis, aims and content are different. It obliges the ICRC to show greater restraint than the law of neutrality imposes on the Swiss authorities or on other legal entities domiciled in Switzerland, but it is also an attitude of openness to the world, a readiness to help all victims, to whatever side they may belong.

Switzerland is the depositary of the Geneva Conventions and their Additional Protocols.26 This responsibility is in the first place an administrative one: the depositary keeps the original text of the treaty in safe custody, prepares certified copies of it, receives instruments of accession or ratification,
keeps them in safe custody and notifies all states concerned of them. They keep
However, these duties may easily raise thorny questions, the settlement of
which requires consultations between the depositary and the ICRC. Switzer-
land furthermore invited the states concerned to take part in the 
Diplomatic Conferences of 1864, 1868, 1906, 1929, 1949 and 1974–7, at 
which the Geneva Conventions and their Additional Protocols were adopted.
It was also Switzerland that organized and chaired those meetings, thereby 
assuming not only administrative and financial but also considerable political 
responsibilities, for the failure of such a conference would inevitably have 
affect ed the country that convened it.

The International Committee and the depositary therefore share much 
common ground and have accordingly worked out a division of labour. The 
ICRC proposes a revision of the humanitarian treaties when it deems that the 
time is ripe for it and, with the help of experts from various countries, pre-
pared draft articles for submission in due course to a diplomatic conference.
It is then up to the Swiss Federal Council to organize, convene and chair such 
a conference to consider the drafts and adopt the final texts, the ICRC acting 
only as a non-voting expert.

Switzerland also gives the ICRC considerable financial support. From the 
very start the Committee members have looked to their fellow citizens to 
provide the necessary support for its activities. For many years these were 
covered only by donations and legacies, for the Committee appealed to public 
generosity and not for government subsidies. The Swiss government appears 
to have made its first contribution – 150,000 Swiss francs – to the ICRC 
during the First World War. In the Second World War it provided 3,200,000 Swiss francs, and since 1951 it has made an annual contribution 
to the ICRC. The initial amount of 500,000 Swiss francs has risen in propor-
tion to the ICRC’s increasingly extensive tasks and activities; from 
1 million Swiss francs in 1963 the annual contribution grew to 2.5 million in 
1968, 7.5 million in 1972, 20 million in 1982, 40 million in 1986, 45 million 
government has also made special contributions in response to the appeals 
that the ICRC has had to make to finance its operations in the field, and for the centenary of the Red Cross it presented the ICRC with a new building 
which houses the Central Tracing Agency.

Fearing that it might become financially dependent on the Swiss govern-
ment and so lose some of its freedom of action, the ICRC has done its utmost 
to persuade the other states party to the Geneva Conventions to cover a 
greater part of its expenditure. For the year 1997 the Swiss government’s 
contribution amounted to 12.7% of ICRC receipts.

Switzerland has nevertheless made great financial efforts to help the ICRC; its total contributions between 1914 and 1997 came to more than 1225 
million Swiss francs. It also gives invaluable help in the conduct of ICRC
operations.
The ICRC has its headquarters in Switzerland, i.e. in neutral territory, and can therefore keep in contact with all belligerents. For operational purposes this is a major advantage, as the ICRC found, *a contrario*, during the Second World War when Switzerland was surrounded by Axis territory and communication with the Allies was consequently impeded.

Switzerland has also provided the ICRC with relief supplies in kind and means of communication, including aircraft and air crews. But Switzerland has no monopoly of such aid, and other states, together with the European Union, have given the ICRC logistic support to a steadily increasing extent.

Switzerland has also often agreed to allow the ICRC to use its territory, for example for the internment in a neutral country of seriously sick and seriously wounded prisoners of war or to repatriate prisoners of war or civilian captives. Besides numerous such operations in both world wars, two operations for the release of Israeli and Palestinian prisoners took place at Cointrin Airport, Geneva, on 14 March 1979 and 20 May 1985.

In diplomatic matters Switzerland gives the ICRC unobtrusive but effective support. When appropriate, the Swiss Federal Department of Foreign Affairs issues ICRC delegates with diplomatic passports, which in many countries work wonders in obtaining visas and settling customs formalities.

The Swiss government has also frequently used its influence, in response to the ICRC's request, to persuade belligerents to fulfil their humanitarian obligations. It has no monopoly in providing such help either, for all states party to the Geneva Conventions are entitled to intervene to ensure that they are respected, but the most steadfast support for the ICRC has undoubtedly come from Switzerland.

Switzerland is, by far, the state most often asked by belligerents to safeguard their interests and those of their nationals. In the Second World War the Swiss Confederation was representing the interests of thirty-five states, including most of the great powers: the British Empire, France, the United States, Germany, Italy and Japan. Since the Second World War belligerents have usually not bothered to ask a Protecting Power to look after their interests and those of their nationals. Protecting Powers have been appointed in only five conflicts; in four of them Switzerland's services were requested.

As already indicated above, the mandate assigned to a Protecting Power by international humanitarian law is very similar to the International Committee's tasks. It has consequently done much to promote especially close ties between Berne and Geneva, sometimes tinged with rivalry but mostly imbued with an equal concern for the welfare of war victims.

There is also a symbolic link between the ICRC and Switzerland whose importance should not be underestimated. Whereas there may be good reasons for doubting that the Constituent Conference of October 1863 deliberately inverted the colours of the Swiss national flag to form the distinctive emblem of the volunteer medical services so fervently advocated by Dunant,
this was the design adopted, and it has long been confirmed by positive law. Article 38, paragraph 1, of the First Geneva Convention stipulates that:

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces.48

Of all the links between the International Committee and Switzerland, this symbolic one is perhaps the strongest. There is probably no link that the ICRC and the people of Switzerland would less willingly give up, although it could be argued that choosing the Swiss national colours was not consonant with the spirit of universality that the founders of the Red Cross had in mind.

* *

Thus the Swiss Confederation has given the International Committee invaluable financial, operational and diplomatic support which reflects the special relationship between the ICRC and Switzerland, the Swiss humanitarian tradition and the widely held belief of the people of Switzerland that a country which has the immense privilege of being spared the horrors of war is bound to make special efforts to help war victims. There is no doubt that this effective and constant support has made a decisive contribution to the development of the ICRC and of the Red Cross movement in general. Without it the Red Cross would not be what it is today.

However, the Swiss government has not only never refused the ICRC its support, it has also benefited from the fact that the ICRC has its headquarters in Switzerland. When the country’s national existence was threatened, as in the Second World War, the Swiss diplomatic service regularly pointed out that the headquarters of the International Committee were on Swiss soil, and that the Committee could render great services to the belligerents which would come to an end if Switzerland were invaded.49 Diplomatic correspondence also shows that some of the belligerents gave the ICRC’s activities as one of the reasons for respecting Swiss neutrality, in spite of the concessions extorted from the Swiss government by German pressure.50

More generally speaking, Switzerland has benefited from the ICRC’s high reputation and from the association of ideas in much of public opinion – if only because of the red cross emblem – between the Red Cross and the country where it was created.51

There is, then, a special relationship between the ICRC and Switzerland that differs from the relationship between the ICRC and other states. The ICRC’s relations with Switzerland are unique because its headquarters are in Switzerland and because it recruits its members there.

As already stated, these relations do not, in my view, subordinate the ICRC to the Swiss authorities. But not everyone is of this opinion. Some commentators, maintaining that no state could possibly tolerate the existence on its
territory of an independent centre of decision, regard as nonsense any claim that the International Committee is independent of the state. They believe that it can only be an auxiliary of Swiss diplomacy and that its independence is a mere façade.

It would not be true to say that the Swiss federal authorities have never attempted to influence the ICRC. All in all they have shown great respect for its independence. Nonetheless, they have sometimes brought pressure to bear on it. But what government has not tried to influence the ICRC when its national interests were at stake? The Swiss federal authorities are not alone in this respect, and their attempts to do so are indistinguishable from those of other governments.

The opinion that the ICRC’s independence is a mere fiction is contradicted by state practice. If the ICRC were simply Swiss diplomacy’s humanitarian showcase and all important decisions were taken in Berne, attempts by states to influence it would be made there, not in Geneva. But the opposite happens. When foreign governments want to put their case, or protest against a decision by the ICRC, they do so in Geneva, not Berne. State practice thus confirms that the ICRC is truly independent.

But the Committee’s own attitude then has to be considered. Indeed, independence is not merely a legal relationship; it is also a matter of resolve and a state of mind. Any number of people who owe nobody anything nevertheless place themselves under somebody else’s protection, either because they do not realize that they are independent or because they do not feel strong enough to stand on their own feet and make the decisions that are the price of freedom.

Two questions therefore arise: is the ICRC really and truly aware that it is independent, and has it maintained sufficient distance from the Swiss authorities for its independence to be credible?

From the outset the Geneva Committee was fully aware that its future lay in international, not national, relations. There is ample evidence of this. For example, just after the Constituent Conference of October 1863 the Geneva Committee asked all members of the Conference to set up national committees in their several countries. The Swiss delegate, Dr Lehmann, retorted by proposing that the Geneva Committee should declare itself the relief committee for Switzerland. His letter to Gustave Moynier reads:

Regarding the formation of a relief committee for Switzerland, I am convinced that the best thing to do would be to ask the Geneva International Committee to declare that it is the Swiss national committee. It will be impossible to form any Swiss national committee that will be more likely to perform the noble task of national committee for our country, for your committee has the outstanding merit of initiative and also that of having so excellently conducted the proceedings until now.

Moynier’s reply has unfortunately not survived, but it is well known that the Geneva Committee did not take up Dr Lehmann’s proposal.
Similarly, three years later, when the Geneva Committee issued a circular letter announcing the formation of a Swiss Central Committee in Berne, it took the opportunity of making clear that its own field of action was on the international plane and that it had no responsibilities in national matters. Having announced the formation of the Swiss Committee for Relief to Wounded Soldiers, the International Committee stated as follows:

To prevent any confusion in your mind between the new association just mentioned and the International Committee, we wish to point out that although the headquarters of the International Committee are in Switzerland it does not exist to assist the Swiss army, but only to serve as a link between the various national committees and, as a central office, to offer them facilities for the exchange of communications.

It was so mandated by the Conference of 1863, and will continue to function for as long as it can be useful in that way. Its relationship with the Swiss Committee in Berne will be the same as its relationship with the foreign committees.55

So ever since its foundation the Geneva Committee has been fully aware that its own sphere of action was on the international plane and did not include any responsibility for national affairs. It affirmed that its relations with the Central Committee of the Swiss Society for Relief to Wounded Soldiers were precisely the same as with the central committee of any other country.

It might be supposed that it was equally determined to affirm its independence from the Swiss federal authorities, all the more so as the scale of its tasks and activities was increasing and its specific mandate was becoming more widely recognized by the international community; but in fact things were not so simple. The growing responsibilities of the ICRC doubtless helped to consolidate its international position, but also increased the resources it needed to discharge them, and so made it more dependent on donors. And one of its principal donors is the Swiss federal government.

The question cannot therefore be answered by deductive reasoning, and we must look to the practice of the ICRC to find out how far it has been determined to affirm its independence from the Swiss authorities.

That determination has varied from one time to another. In the First World War the ICRC managed to keep its distance from the Swiss authorities, which showed a dangerous complaisance towards the Central Powers. Thus when the Confederation was faced with the task of persuading world opinion that it was genuinely following a policy of neutrality, a belief that had been shaken in Allied circles by the disastrous manoeuvres of the Swiss Federal Councillor Arthur Hoffmann, it was Gustave Ador, the President of the ICRC, who was asked to replace him.56

In the Second World War, however, the International Committee largely allowed itself to be taken in tow by the Swiss federal authorities. This attitude is hard to explain. It cannot be entirely attributed to the influence of Philipp Etter, Swiss Federal Councillor and a member of the International Committee since 6 August 194057 nor to Édouard de Haller, a member of the
International Committee who was appointed as the Swiss Federal Council’s delegate for international relief operations. From June 1940 onwards Switzerland was in a particularly dangerous position, and it was probably this that induced the members of the Committee, like most other Swiss citizens, to close ranks behind the Swiss Federal Council. By doing so they unwittingly forfeited some of the Committee’s international standing and freedom of action.

The heavy hand of the Swiss federal authorities was probably most noticeable at the session of 14 October 1942 at which the Committee had to decide on a draft appeal concerning the conduct of the war. Swiss Federal Councillor Philipp Etter – who was moreover President of the Swiss Confederation for 1942 – came specially from Berne to Geneva to speak out against the draft appeal. Undoubtedly his opposition, and that of Édouard de Haller, were largely instrumental in tipping the scales in the direction desired by the Swiss Federal Council: the draft appeal was rejected.

The lesson was not lost on the International Committee, for since the Second World War no person has been elected to it whilst in office as a Swiss federal councillor.

The new Geneva Conventions of 12 August 1949, confirming and extending the ICRC’s powers and responsibilities, might have been thought to make it more independent of the Swiss federal authorities. In fact they hardly did so, for the International Committee has taken little interest in the possible effects on its own status of the new functions assigned to it.

The ICRC has however not been altogether consistent. It has readily declared that it is independent of any political authority, including, therefore, the Swiss federal authorities, but its deeds have not always matched its words. For example, it is astonishing to read in an ICRC press release that Mr August Lindt, then recently appointed ICRC Commissioner General in Nigeria, appeared for his first interview with the head of the Federal Military Government of Nigeria in the company of the Swiss ambassador in Lagos (instead of that of the head of the ICRC delegation). There could be no surer way of convincing the Nigerian authorities that the ICRC was a mere instrument of Swiss diplomacy!

In other situations the ICRC has clearly stood apart from the Swiss authorities, for example during the crisis that followed the invasion of Kuwait on 2 August 1990. Although Switzerland was not a member of the United Nations, the Swiss Federal Council immediately endorsed the embargo against Iraq decreed by the Security Council. The ICRC, however, offered its services to the Iraqi government and confirmed that offer during several missions to Baghdad in the summer and autumn of 1990. The Iraqi authorities recognized the ICRC’s special position, for although Swiss nationals – like those of other countries taking part in the embargo – were forced to stay in Iraq, ICRC delegates were free to come and go.

On 19 March 1993, the International Committee of the Red Cross and the Swiss Confederation, acting on a proposal originally made by the study
group set up by the Federal Council to consider the future of Swiss foreign policy and set forth in the original French version of this book, concluded a headquarters agreement to determine the legal status of the ICRC in Switzerland. This agreement recognizes the ICRC’s international legal personality and legal capacity in Switzerland, guarantees its independence and freedom of action and grants it the same privileges and immunities as are accorded to international organizations that have their seat in Switzerland; it specifies the scope of the relations between the ICRC and Switzerland, situates them where they belong, namely on the footing of public international law, and gives the international community confirmation of the ICRC’s independence from the Swiss authorities.

Two conclusions may be drawn from the foregoing analysis.

The first is that the ICRC, which in international law has a legal personality separate from that of Switzerland, should not be afraid to proclaim loud and clear that it is independent of the Swiss federal authorities, and it should take care to act accordingly. It should obviously not disavow its great debt to Switzerland, but simply recognize that its special responsibilities as an international organization oblige it to keep its distance from the Swiss government.

Secondly, the ICRC should keep out of discussions on Swiss foreign policy, as its principles require it to do. Such issues are political, and it is not for the ICRC to express an opinion on them unless Swiss neutrality, from which the ICRC derives support, were directly and manifestly threatened. That, indeed, was its attitude to the question whether Switzerland should join the United Nations, and it should, in my view, show equal reserve with regard to Switzerland’s possible entry to the European Union.

Notes

1 See Book III, Chapter I, above, pp. 954–72.


9 Concerning the composition of the International Committee, see Book III, Chapter II, above, pp. 973–88.

10 ‘Citizens have the right to form associations provided that neither the purpose of such associations nor the means used to carry it out are illegal or dangerous to the State. Cantonal laws shall lay down the measures required to repress the misuse of this right.’ Article 56 of the Federal Constitution of the Swiss Confederation of 29 May 1874.

11 See Book III, Chapter I above, p. 955.

12 Note from the Swiss Federal Council to the International Committee of the Red Cross, dated 25 November 1958, ICRC Archives, file 011.

13 Besides the articles mentioned in the references to this chapter, two studies by Mrs Marion Harroff-Tavel, namely ‘Neutralité et politique’ of 18 May 1988 and ‘Quelques questions souvent posées à propos du principe de neutralité’ of 16 September 1988, are of great interest. ICRC Archives, file 012.


24 Statutes and rules of procedure of the International Red Cross and Red Crescent Movement (adopted by the Twenty-fifth International Conference of the Red Cross at Geneva in October 1986), IRRC, no. 256, January–February 1987, pp. 45–59; *Handbook of the International Red Cross and Red Crescent Movement*, thirteenth edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent
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25 Statutes of the International Red Cross and Red Crescent Movement, preamble, IRRC, no. 256, January–February 1987, p. 27; Handbook of the International Red Cross, p. 417.

26 See common Article 57/56/137/152 of the Geneva Conventions, Articles 93 and 100 of Protocol I, and Articles 21 and 26 of Protocol II.


29 Appeal to the population of Geneva, 15 June 1864, Recueil des circulaires du Comité international, collection (no reference number) in the ICRC Library.

30 Rapport général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920, p. 230.


34 In 1997 the Swiss government contributed 15,734,000 francs in response to ICRC appeals for operations in the field, in addition to its regular contribution of 65 million. See Annual Report 1997, p. 354.


37 Approximately 875 million US dollars at the rate for mid-1999. See the ICRC’s Annual Reports from 1912 to 1997. This figure does not include contributions in kind. However, part of the contributions made by the Swiss government, other governments, National Red Cross or Red Crescent Societies and private persons goes to the Swiss treasury through the taxes collected on the salaries paid by the ICRC to its staff members.

38 For example, after the conflict between India and Pakistan in December 1971 the Swiss government placed two DC-6 aircraft at the ICRC’s disposal for its relief operation in Bangladesh, Annual Report 1972, pp. 53–4, and in November 1973 provided four aircraft with which the ICRC repatriated 8300 Egyptian prisoners of war and 241 Israeli prisoners of war captured in the Arab-Israeli conflict of October 1973, Annual Report 1973, p. 12.

39 In the First World War Switzerland agreed to intern or admit for hospital treatment more than 67,000 wounded or sick prisoners of war, Édouard Favre, L’internement en Suisse des prisonniers de guerre malades ou blessés, 3 volumes, Librairie Georg & Cie, Geneva, and Bureau du Service de l’Internement, Berne, 1917–19.


42 William McHenry Franklin, Protection of Foreign Interests: A Study in Diplomatic and Consular Practice, United States Government Printing Office, Washington, 1946,

See Book II, Part VII, Chapter II above, pp. 860–3.

As Hans Frölicher, Swiss minister in Berlin, once wrote: ‘The International Committee of the Red Cross has covered itself with laurels. These also adorn the head of our Helvetia. I say so only because colleagues in the Foreign Interests Department appear to me to be unjustifiably hostile to the International Committee of the Red Cross, and I have often to intervene to persuade them that the ICRC is not a competitor of theirs’, Frölicher to Pilet-Golaz, 3 June 1944, quoted by Bonjour, *Histoire de la neutralité suisse*, vol. V, p. 145.

46 Janner, *La Puissance protectrice, passim*.

47 This is at least the conclusion to be drawn from a letter by Dr Brière to Henry Dunant, probably dated 3 February 1864, ICRC Archives, file: Switzerland 1863–1870, box 16, file 2; Pierre Boissier, *History of the International Committee*, pp. 76–7.

48 There is no reference to the inversion of the Swiss colours in the Geneva Convention of 22 August 1864, but it appears in the Geneva Convention of 6 July 1906 (Article 18) and is repeated in the Convention of 27 July 1929 (Article 19, paragraph 1).


50 *Ibid.*, vol. VI, pp. 322 and 349. It would be foolish to believe that Swiss independence was preserved because of the humanitarian services that the ICRC could render belligerents. The decisive factors were obviously of quite another kind. But diplomatic correspondence does show that the belligerents were not oblivious to these considerations and that the ICRC’s activities, together with Switzerland’s work as a Protecting Power, did help to some limited but noticeable extent to tip the scales in favour of respecting Swiss independence and neutrality.

51 ‘The ICRC has also upheld Switzerland’s good name. It conveys an image of our country as dedicated to a humanitarian and peaceful ideal. It enhances its reputation abroad...’, François-Charles Pictet, ‘Le CICR...’, p. 24.


53 Letter from Dr Lehmann to Gustave Moynier, 2 December 1863, ICRC Archives, file: Switzerland 1863–1870, box 16, file 2.


56 In the spring of 1917 the Swiss Federal Councillor Arthur Hoffman, as head of the Swiss Federal Political Department, lent himself to secret negotiations for the conclusion of a separate peace between Russia, where the Tsar had recently been overthrown, and the Central Powers. These negotiations were obviously directed against Russia’s Provisional Government (which had announced that it would continue to fight on the side of the Allies) and against the allies of Russia. Accordingly, when the negotiations were discovered, Hoffmann, who had acted without the knowledge of his colleagues, had no alternative but to resign on 18 June 1917. A week later the Swiss Federal Assembly elected the ICRC President, Gustave Ador, to replace him. For further details, see Edgar Bonjour, *Geschichte der Schweizerischen
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59 ICRC Archives, Minutes of the Plenary Session of 14 October 1942; Favez, Une mission impossible?, pp. 156–64.
60 ‘The ICRC is a private and independent institution, subject to no influence and which remains strictly neutral in all circumstances. Its decisions cannot be swayed by representations from any quarter.’ The ICRC and the question of Koreans in Japan, press release no. 676 of 13 March 1959, RICR, English supplement, vol. XII, no. 4, April 1959, pp. 85–6.
61 Agreement between Lagos and the ICRC, Press release no. 906, 3 September 1968.
63 Press release no. 1640 of 2 August 1990; Note no. 241 from the delegation in Baghdad to the ICRC + annexes, 12 September 1990, ICRC Archives, file 232 (214–00). Needless to say, the ICRC never intended to violate the embargo ordered by the Security Council or to be a blockade runner, but simply to invoke the provisions of Article 23 of the Fourth Geneva Convention and use the humanitarian loopholes in the embargo resolutions to provide food and medical assistance to the civilian populations of Iraq and occupied Kuwait. Even within those limits, the ICRC was able to distance itself from the international community and Switzerland by offering its services.
64 The agreement guarantees the inviolability of ICRC premises, archives, mail and means of communication and grants it immunity from legal process and execution; it also grants the members of the Committee and ICRC staff and experts immunity from legal process for all acts performed in the exercise of their functions. Any divergence of opinion concerning the application or interpretation of the agreement which could not be settled by direct negotiations between the parties may be submitted by either party to an arbitral tribunal of three members. Although it is concluded between the Swiss Confederation and a legal person domiciled in Switzerland, the headquarters agreement of 19 March 1993 is unquestionably an international agreement governed by public international law.
66 The Swiss federal authorities appear to share this opinion. See the Message concernant l’adhésion de la Suisse à l’Organisation des Nations Unies (Message concerning the Accession of Switzerland to the United Nations), dated 21 December 1981, offprint from the Feuille fédérale, 1981, no. 81.081, pp. 75–6, which contains the following passage (here given in translation): ‘The fundamental principles of independence, neutrality and impartiality which govern the work of the ICRC thus also apply to its relations with the Swiss Government. The Federal Council has always respected these principles and intends to respect them hereafter. Conversely, it is in the interest of the ICRC to maintain its independence of the Swiss authorities’.
67 ‘The International Committee of the Red Cross (ICRC), having noted that its name has been mentioned several times in connection with the vote that will determine whether Switzerland
enters the United Nations, wishes to reiterate its position: this is a choice involving foreign policy that will be made by the people and the cantons of Switzerland. The ICRC will therefore abstain from intervening in this debate and from taking position on either side. Consequently, neither those who support nor those who oppose Switzerland's entering the United Nations have reason to draw any substance from the fact that the ICRC will not take sides in this matter. The ICRC and the vote determining whether Switzerland will enter the UN, press release no. 1516 of 21 January 1986 (the interpolation in square brackets is a correction to the English translation, which does not correspond to the French original); letter from the President of the ICRC to Édouard Zellweger, Chairman of the Consultative Commission on Switzerland’s relations with the United Nations, 30 April 1975, ICRC Archives, file 130; Rapport de la Commission consultative pour les relations de la Suisse avec l’ONU au Conseil Fédéral, 20 August 1975, Chancellerie Fédérale, Berne, 1975, pp. 54–5.

References

CONCLUSIONS:
THE INTERNATIONAL COMMITTEE OF
THE RED CROSS AND
THE CHALLENGES OF
OUR TIMES

Ideals are like stars:
we never reach them,
but like the mariners of the sea,
we chart our course by them.
Carl Schurz
Conclusions do not conclude. They look both to the past and to the future.

The International Committee of the Red Cross was the brainchild of five private individuals, Dunant, Moynier, General Dufour, Dr Appia and Dr Maunoir, who set out to transform into reality two ideas put forward by Henry Dunant in his book *A Memory of Solferino*:

- the creation in all European countries of voluntary relief societies to provide care for wounded soldiers;
- the formulation of an international principle, sanctioned by a Convention inviolate in character, that would protect the wounded and all who try to come to their aid.

The Committee aspired no higher. It believed that there would be no further need for it once the relief societies were formed and states had pledged to protect the wounded and the personnel caring for them. ‘We shall rest well content to have fostered the growth of an institution that will spread little by little and whose good works will surely earn it the goodwill of all’, said Gustave Moynier at the Constituent Conference of October 1863, at which the Red Cross came into being.¹

But history gave him the lie. It soon became clear that a permanent central body was required to look after the general interests of the Red Cross and to maintain liaison between the newly formed relief societies, especially in time of war. Also, the need for a neutral intermediary between the belligerents became clear when the Geneva Convention was put into effect. The International Committee therefore had to assume a role undreamed of by its founders, and did so beyond all expectations.

On glancing back over the 135 years since its inception, it can be seen to have evolved in four ways: in terms of those it helps, the situations in which it intervenes, the geographical scope of its activities, and the kind of tasks it is ready to perform.

When the International Committee was founded it was concerned only with the wounded and sick in armies in the field and the medical personnel tending to them. Since then it has progressively extended its services to shipwrecked naval personnel, prisoners of war, civilians in the power of the enemy and, since the Second World War, to civilian victims of military
operations – especially air raids – and of the famines and epidemics that are all too often an after-effect of war.

As for the situations in which the Committee intervenes, these were originally only conflicts between states, excluding internal conflicts and colonial wars, but since the Russian Civil War and the Hungarian Revolution the ICRC has also sought to protect the victims of non-international armed conflicts, and of internal disturbances and tension which are often a forewarning or result of armed conflicts.

Before the Italo-Ethiopian War of 1935 its activities did not extend beyond Europe, and although the ICRC sent missions during the First World War to North Africa, India, Burma and even to Japan, they went there to visit German and Austrian prisoners of war and not to help the local population. The ICRC did not intervene in colonial wars, which were not regarded as international wars as defined by the international law of the time. It was not until the war between Spain and the Rif tribesmen of Morocco (1921–6) that it decided to offer its services to the belligerents, but its approaches came to nothing. Since 1945 the situation has to some extent been reversed: the centre of gravity of ICRC activities is now in Asia, Africa and Latin America.

The range of activities the International Committee is prepared to undertake has also been extended. Resolution IV/3 of the Berlin Conference of 1869 gave the ICRC responsibilities solely for liaison: it was requested to ‘...ensure that a liaison and information office is set up in a suitably chosen location, which shall facilitate, in every possible way, the exchange of communications between committees and the sending of relief supplies’. In the Franco-Prussian War of 1870 the International Committee was at pains to make clear that its place was not on the battlefield:

On several occasions, surprise has been expressed that we have not sent a representative to the theatre of hostilities; it should be superfluous to explain ... why we have not done so. Our place was not on the battlefield, and the Committees on either side would not have been surprised by our absence. We have remained where our duty lay, and where our presence was required by unceasing work.

These reservations no longer apply. Since 1914 ICRC delegates have been active in prisoner-of-war camps and camps for civilian internees, and since the Italo-Ethiopian War and especially the Arab-Israeli conflict of 1948, often in the theatre of war itself. In its role as a neutral intermediary the ICRC has thus increasingly sought to help victims of war on the spot, widening the range of its activities accordingly and concentrating more and more on practical operations that require a greater presence in the field. Where safety zones are being set up or the wounded and civilians are being evacuated, or in repatriation operations during hostilities, ICRC delegates will be found at the scene of battle, and very often between the lines.

In other words, the work of the International Committee has expanded beyond measure in three respects:

- **in terms of the categories of victims**: it tries to reach all war victims needing its help, whatever their status or the nature of the conflict;
in geographical coverage: it is prepared to take action in any part of the
world, no region or country being excluded a priori;

in terms of reference: there is no relief operation needed to ensure the sur-
vival of war victims, or to spare them suffering, that it will refuse in
advance.

In practice, however, this expansion is restricted by the narrowly calculated
resources at its disposal and the limited extent to which governments are pre-
pared to accept its services.

The threefold universality towards which the ICRC has gradually evolved
cannot therefore be regarded as an objective attainable within a set time.
Rather it is an ideal or a landmark on the horizon which, though too remote
ever to be reached, guides it on its course.

Whether it will be possible to approach this ideal depends on what the
future holds for the ICRC and on how it will overcome the challenges of the
world of tomorrow. Predicting the future has been the historians’ perennial
temptation and those who have indulged in it have frequently had cause to
regret their tenuity. It is no easy matter to study the history of our own
times in an attempt to identify the lines of force that shape it; but it is down-
right dangerous to extend those lines into the future, for all too often history
chooses to change direction when least expected to do so. A few conjectures
can be ventured only with extreme caution, and all the usual reservations.

For methodological reasons the most pessimistic scenarios, such as a third
world war or a general nuclear conflict, must be ruled out; not because the
world is safe from such disasters, but because they would alter conditions so
dramatically that their consequences would be unpredictable.

The only reasonable field of investigation is therefore what might be called
realistic forecasting, that is, extending into the fairly near future the lines of
force that emerge from an analysis of the present and the recent past.

Despite the thaw in relations between the United States and Russia and
between Russia and China, it would probably be illusory, for various
reasons, to expect any perceptible and lasting reduction in the number of
armed conflicts in the world.

First of all, there are economic factors: the growing imbalance between
rich and poor countries, protectionism, the appalling indebtedness of many
countries, and above all the ever-widening disparity in Africa, Latin America
and some Asian countries between the population explosion and economic
stagnation. When the population of an entire continent steadily rises while
agricultural output remains unchanged, disaster is inevitable. Sooner or later
the fringe groups living in abject poverty below the subsistence level, and the
countless multitudes whose living conditions deteriorate year after year, will
rebel against their unjust fate.

Other factors to be reckoned with are the internal instability of many
countries, due to their weak and inadequate institutions, the seizure of power
by oligarchies for their own advantage, in utter contempt of the national
interest, and the transposition of nineteenth-century European models
ill-suited to local conditions. To have imported a centralized style of government derived from that of the French Revolution or Hegel’s concept of the nation-state has brought untold suffering to other parts of the world. In some extreme cases the seizure of power has led to unmitigated state gangsterism on sinister Nazi-inspired lines, and left-wing or right-wing Nazi imitators (for the extremes meet and are indistinguishable, whatever their labels) have succeeded in exploiting several Third World countries for their own ignoble ends.

Another cause for anxiety is the artificiality of certain national borders redrawn in the aftermath of two world wars or inherited from colonial domination, especially those in Africa. The last twenty years have done nothing to allay the resulting unrest, which in the long term is likely to cause particularly vicious conflicts, because states will be tempted to distract attention from their internal problems by channelling discontent towards neighbouring countries.

The break-up of Yugoslavia and the Soviet Union has shown that structures maintained by force may one day collapse and that states that appear as solid as rock may suddenly fall apart.

There is also the worrying factor that the world of today cannot work out political settlements to its armed conflicts. International co-operation at the United Nations and fear of nuclear war have admittedly prevented hostilities from spreading, but have not been able to clear them up. In the Middle East, Kashmir, South-East Asia and Korea war has been smouldering or flaring up for the last forty years or more. This inability to achieve political settlements is not confined to the Korean and Indo-Chinese conflicts, which may be regarded as the bitter fruit of the Cold War; it is also characteristic of recent basically regional conflicts such as that in Cyprus and the Iran-Iraq war. In Europe, before the French Revolution, kings were adept at the art of compromise. If they lost a war they ceded a province. Our democracies seem unable to do this – and modern dictatorships even less so.

Last but not least, all the internal tensions – whether motivated by economic, social, ethnic or religious differences – which remained pent up throughout the Cold War came to the fore as soon as the threat of a third world war faded away.

Far from opening the way to the general and lasting peace that peoples hoped for and that even seemed close at hand when the Berlin Wall crumbled and the Soviet Union disintegrated, the end of the Cold War led to a resurgence of unbridled nationalism, uncontrolled fanaticism and racial hatred. The centre of gravity of armed conflicts has shifted from the fracture lines of the Cold War to the very heart of nations and peoples.

For all the above reasons it would be unrealistic to expect any marked and lasting reduction in the armed conflicts that are ravaging the world, and consequently of the appeals that will be made to the ICRC. However, the situations in which it works will certainly change. There will be a more intimate mix of endogenous (national) causes of conflicts with external ones, even if
the great powers are less prompt to intervene than in the past. There will therefore be a proliferation of conflicts of a dual nature, internal in some respects and international in others; but contemporary international law, based as it is on the dichotomy between international and non-international armed conflicts, is not easily adaptable to hybrid situations of this kind.

Also to be expected is a greater recourse to guerrilla warfare and in general to new methods of combat, combined with a growing tendency for combatants to merge with the civilian population. The inevitable result will be that the fundamental distinction between combatants and the civilian population will be still further eroded, and that there will be more civilian victims than ever before.

Internal instability and state gangsterism will make it increasingly necessary to protect individuals against their own government in situations of armed conflict, or even in peacetime. But individuals can hardly be protected against the state of which they are nationals so long as international law is based on the assumption that the state is the natural protector of its citizens.

Almost certainly, future conflicts will result in an ever greater need for humanitarian services, especially relief operations. The economy of many countries is too fragile to survive any crisis. Even a fairly minor upset such as internal disturbances or a bad harvest has disastrous effects on a civilian population whose life is already one long struggle for survival. A striking example of this is the conflict in Mozambique (1975–92), where fairly small-scale clashes – judging by the limited number of combatants on either side, their comparatively weak weaponry and the sporadic nature of the fighting – that never made the headlines ruined a country larger in area than Britain and uprooted one-third of its fifteen million inhabitants. There is every reason to believe that such events will become more and more common, especially in Africa, and that even relatively limited conflicts – limited as regards the military hardware used or the size of military operations – will have disastrous consequences in terms of human suffering.

Nor should the role of the media be overlooked. Until fifty years ago Bengal or China could be stricken by a major famine and the rest of the world would have known little or nothing about it. Things are very different nowadays, when television brings images of the agonizing plight of victims into every home. A striking example of this was given in October 1979 when the tragedy that had unfolded for many years in Cambodia, snugly concealed behind a bamboo curtain, suddenly came into the limelight as tens of thousands of refugees crossed into Thailand. The resulting outcry in most countries of the world obliged their governments to tackle a calamity that until then had been left to fester unheeded.

This heightened awareness of the plight of war victims, starkly portrayed by the new visual media, has led to the formation of many new organizations for their relief. It has often been said in the last few years that the ICRC has lost its previous monopoly of humanitarian activities. This is a great exaggeration. The ICRC has never had a monopoly, either de facto or
de jure, as is clear from the work in both world wars of the Protecting Powers and the various national branches of the Young Men’s Christian Association. Apart from their work, however, there is no denying that until the civil war in Nigeria (1967–70) humanitarian agencies were few and far between. But that is no longer the case. There are now large numbers of voluntary agencies of all kinds, religious and secular, some working in several countries, others formed to deal with a particular situation or group of victims. Since many of these agencies confine themselves to limited one-off operations, they may appear to succeed where the ICRC appears to fail. This is not really surprising, for their responsibilities cannot compare with those of the ICRC and they can therefore adopt methods which an institution committed to long-term action and to working on both sides of the front cannot possibly use. Some National Societies too, fearing that the public will transfer its support from them to these voluntary agencies, are tempted to go it alone by engaging in activities hitherto reserved – and recognized as such – for the ICRC alone. Lastly, states have begun to carry out large-scale relief operations themselves instead of simply giving their financial and logistic support, as they did in the past, to those conducted by humanitarian institutions.

The turning point came during the Gulf War in the spring of 1990. The United States, France, the United Kingdom and other members of the anti-Iraq Coalition invoked Security Council Resolution 688 to take military action in northern Iraq so as to protect the Kurdish population from repression by Baghdad and provide them with urgently required relief supplies. Similar but more modest operations were undertaken in 1992 in Bosnia-Herzegovina and Somalia. This marked the reappearance under the term *droit d’ingérence*, or the right to intervene, of the old right of humanitarian intervention that existed in Europe at the time of the Ancien Régime and in the nineteenth century, in other words intervention by major powers in the affairs of small countries.

It is still too early to measure the consequences of that change, and any assessment would in any case have to be carefully qualified. On the one hand, government relief operations have had uncontested beneficial results and have saved many lives. Moreover, in both Bosnia and Somalia the ICRC and other humanitarian institutions were, if not unable to work, at least seriously impeded by the extremely hazardous conditions. How, therefore, could they reproach the various states for entering onto the stage at a time when they were no longer able to meet the needs of the population?

On the other hand, the politicization of humanitarian action carries with it great risk. The aid thus distributed may be viewed as a means used by the great powers to exert political influence; any future operation not backed by force may consequently be brought to a standstill. If aid can be imposed with weapons, even the most disinterested of assistance may be perceived as a pretext to justify interference in the internal affairs of states and recourse to armed force. The chief responsibility of the great powers is not to provide aid
to the victims of conflicts – usually the humanitarian institutions can do this and have the necessary expertise – but to maintain international peace and security, in accordance with their self-assigned mandate. The humanitarian impact of their operations in Iraq, Bosnia-Herzegovina and Somalia cannot disguise the fact that those operations were required because of the incapacity of the great powers to impose political settlements.

The positive consequences that may rightly be expected of direct state intervention in the humanitarian domain do not obviate the cause for long-term concern.

In so far as the present can be taken as a guide to the future, in the next five or ten years there will probably be just as many conflicts as before; there will still be as many victims and the resultant humanitarian needs will be at least as great as, and probably even greater than, those with which the International Committee has had to contend over the last few years. The ICRC will have to work in more difficult conditions because of the intrinsic complexity of the conflict situations it will encounter, the disparity between these and the concepts on which humanitarian law is based, and the presence of many different bodies often working without co-ordination in what was previously recognized as the ICRC’s traditional field of action.

Before being able to suggest how the ICRC may be able to cope with these greater needs and new conditions whilst avoiding their attendant pitfalls, the main challenges it will have to face must first be identified. For clarity’s sake, it is advisable to separate internal challenges – those that can be addressed only by means of changes within the ICRC itself – from external challenges, in other words those it has to contend with in the outside world.

The first challenge is growth. There will be no way of meeting greater needs without a parallel increase in the Committee’s financial and material resources.

This challenge is really not a new one; the ICRC’s staff and budget have recently more than doubled over a ten-year period (1988 to 1998).5 So far the ICRC has managed to overcome the theoretical6 and practical problems of its own growth. Nevertheless, each stage of any such process brings new risks and new difficulties. As in the past, the ICRC will have to find ways of managing its growth so as to avoid either stagnation or uncurbed expansion.

In the long run, stagnation would inevitably turn the ICRC into no more than a marginal organization. Any activities it might refuse would be taken over by other agencies, which would also siphon off the resources that are now the ICRC’s. It would then soon be without the means of doing the work on which it would like to concentrate. For a humanitarian institution such as the ICRC refusal to take action would be well-nigh suicidal.

Conversely, uncontrolled growth could only mean inefficiency and waste and, before long, loss of identity. For an institution that depends on the trust its donors place in it, uncontrolled growth would be just as suicidal as stagnation.
The question of resources will then arise. The ICRC will have to find not only the financial resources it needs to care for victims, but also its own indispensable human resources.

This is primarily a matter of recruitment. It will need to find a way of attracting greater numbers of motivated men and women, willing to devote themselves to a cause that is simultaneously an ideal. If Switzerland and Swiss residents abroad cannot provide them, the ICRC will have to draw more liberally on the staff National Societies are prepared to make available to it.

Recruiting new staff will be of little use unless the ICRC has an efficient body of managers, and this raises the question of management training. It will have to improve its methods of internal training, management development and succession planning for key positions. Most important of all, it will have to be more successful than hitherto in retaining over the long term the services of the persons it has taken the trouble to train. Despite all its efforts over the past few years, the Achilles’ heel of ICRC staff policy is its still too-rapid staff turnover; men and women who have learned their trade in the only genuine school, that of war and action, take their services elsewhere.

The question will also arise of how the whole organization is to be directed. Given the structure of the ICRC, this will have to be tackled at two levels.

Assuming that the ICRC will have to shoulder ever heavier responsibilities in increasingly complicated conditions, it may well be asked whether the Committee, as now composed, will still be able to overcome the challenges that lie ahead.

The ICRC’s supreme governing body, the Assembly, is still composed of volunteers in the most honourable sense of the word, that is, of eminent Swiss citizens who serve the organization without payment, usually alongside other activities. Voluntary service is a founding principle of the Red Cross and Red Crescent and could not easily be dispensed with, but the problems to be solved demand a highly professional approach, together with the ability to retain an overall view.

The solution will probably be found by striking a careful balance between the responsibilities of the Assembly, made up largely of volunteers, and those of the management, which comprises the ICRC’s most senior professional executives.7

The most difficult problems of ICRC growth probably relate to management. With more staff, greater financial resources and higher expenses, the gap inevitably widens between decision-making centres, on the one hand, and field workers and victims on the other. Bureaucracy becomes ponderous and internal precautions against inefficiency and waste, though essential, may also stifle initiative and the creative spirit.

The ICRC will also have to determine its priorities and the limits of its activities. To cope with more and more appeals each more urgent than the last and the all-too-probable steady deterioration in the plight of war victims, and to avoid the unbridled growth that could be fatal, it will have no choice
but to redefine the bounds of its activities and set itself priorities. Otherwise all it will achieve is a dispersal of effort, which will do little to benefit war victims.

It is out of the question for the ICRC to make do with tailoring its objectives to its resources. It must obviously set its sights on accomplishing the mission entrusted to it and meeting the needs of victims. But in the light of that mission it must define clearly what it wants to do, subject to receiving the necessary resources from the international community, and also its priorities in performing the tasks it sets itself. Otherwise its credibility with donors and victims and the continuity and consistency of its work will be at stake.

Lastly, it will also have to find ways of keeping its members and staff motivated, despite the latter’s steady growth and the increasingly complicated internal rules and regulations. That sense of motivation is perhaps the ICRC’s most precious asset. Without it, and without the conviction that the ultimate purpose of everything it does is to help people in distress, the ICRC will surely lose its soul and turn into a nondescript humanitarian bureaucracy that war victims will soon cease to trust and from which donors will soon withdraw their support.

The external challenges facing the International Committee are of quite another order.

The most urgent one is finance. It will have to find the resources to meet growing needs. Since the ICRC cannot possibly be ruled by financial considerations but must determine its objectives according to its mandate and the needs of victims, it must remind the international community, which gave it that mandate, of its obligation to provide the means of carrying it out. It is not only the volume of contributions that matters, but their regular payment, for as the Diplomatic Conference of 1949 pointed out, the Geneva Conventions require the International Committee to be ready at all times to fulfil the humanitarian tasks entrusted to it by those Conventions. It must therefore maintain, on a permanent basis, the back-up staff needed for future operations. The ICRC cannot maintain its ability to relieve suffering if it has to depend on special contributions, however generous, made to it when public opinion and governments feel a twinge of conscience in a major humanitarian crisis. It has to be able to count on regular contributions.

The ICRC must also adapt to the changed humanitarian environment. Only a few years ago it could regret being almost alone in its work. Things are very different today, and too little has almost become too much. There is no cause for regret in the fact that various organizations are trying to help war victims, the field is broad enough for all of them, but the proliferation of voluntary agencies has brought with it the risk of confusion. Forty-three charitable organizations were working in Bangladesh in 1972; nowadays there are more than a hundred of them in the Democratic Republic of the Congo and just as many in the Sudan and in Kosovo. There is therefore a serious risk of dispersion and wasted effort and, what is worse, of competi-
tion among these organizations in winning the attention not only of potential donors but also and especially of the governments on whom the fate of war victims depends. If there is no basic agreement on operational principles, those governments will quickly see that they can play off one voluntary agency against another to get maximum help with minimum strings attached. Because the International Committee is also mandated to protect prisoners and nationals of the adverse party, it would then be in danger of being dismissed in favour of organizations that have no such responsibilities. The ICRC has of course never been willing to consider ‘paying’ for access to captives in exchange for relief operations, but if it is forced out of relief operations by other organizations that do not have its responsibilities, it will find it infinitely harder to carry out its work of protection. In the long run, war victims will suffer from the rivalry between organizations claiming to help them.

Relief organizations must therefore reach an agreement on certain fundamental principles, especially impartiality, and accept a modicum of coordination. The ICRC’s traditions, its contacts at government level and the logistic facilities it can deploy would appear to single it out as the natural and informal leader of non-governmental agencies. Experience has moreover shown that its leadership is generally accepted; it is sometimes even requested, if not by the head offices of the various organizations then at least in the field, which is the main thing.

The ICRC should not be afraid to exercise its leadership. This means that at all costs it must refrain from thinking in terms of competition, and be willing to treat voluntary agencies as its equal when working with them, however modest their means. Leadership is not a hierarchy but a partnership.

Similarly, the International Committee will have to redefine its relations with the National Societies and their Federation. Admittedly, until 1945 much of the ICRC’s work, including the bulk of relief operations, was carried out via the National Societies. The Committee was an intermediary. As a general rule it took no part in distributing relief supplies; that was done by the National Societies. Its field operations were confined almost wholly to visiting places of internment. But since the Second World War the reverse has become general practice. The ICRC has often been called upon to intervene in countries where the National Society either did not exist or was unable to carry out large relief operations. The Committee therefore fell into the habit of conducting the operations itself and going it alone in all sorts of circumstances. Its relations with the International Federation are just as ambiguous, for although the ICRC and the Federation are, so to speak, allies in defending the general interests of the Movement they are often competitors in operations.

The ICRC will therefore have to redefine its relations with its partners in the International Red Cross and Red Crescent Movement and think up new ways of co-operating with the National Societies and their Federation.
The ICRC will also have to redefine its relations with the United Nations which, thanks to the recent rapprochement between the great powers, has again assumed a role akin to that intended by its founders.

Co-operation between the ICRC and the UN is bound to continue growing. In this respect the observer status granted by the General Assembly to the ICRC on 16 October 1990 is an extremely valuable working tool whose merit was amply demonstrated during the Gulf War.

However, whereas the ICRC will undoubtedly intensify its relations with the UN and have to take into account the common will of the international community as expressed in UN resolutions, it will also have to uphold the specific nature of the mandate it received from that same community and take care not to be perceived as the UN’s ‘humanitarian arm’.

The ICRC was able to act in Iraq throughout the Gulf War, in spite of the sanctions imposed on that country, because it managed to keep its distance from the UN. It must not be forgotten that although the UN has become steadily more involved in humanitarian activities, it remains essentially a political organization whose main goal is eminently political: to preserve international peace and security.

This factor limits the possibilities for co-operation between the ICRC and the UN and determines the ICRC’s attitude towards the role of international humanitarian assistance co-ordinator that certain governments would like to entrust to the UN. The ICRC can agree to new forms of operational co-operation, but it cannot accept any form of supervision. Its specificity and independence must be preserved, now more than ever.

Similarly, the ICRC will have to redefine its relations with the Swiss Confederation. This does not mean that the ICRC should cut itself off from its roots or deny the close ties of history and tradition, or that it should not maintain its present harmonious relations with Switzerland. It does mean, though, that it must find the right distance from the Swiss federal authorities in order to strengthen its independence and neutrality and ensure that, whatever changes may occur in Swiss foreign policy, these attributes remain entirely credible for the outside world.

Lastly, the ICRC must reassess its relations with the press and with public opinion. In the past, those relations have always been characterized by their ambivalence. Indeed, much of the ICRC’s work, in particular visits to places of detention and most of the negotiations conducted with governments, above all those to obtain the release of prisoners, require discretion. Many delegates have seen the doors to a prison closed to them after an indiscretion, or last-minute setbacks to the finalization of a release because proposals were prematurely leaked. In such cases the detainees pay the price in the form of continued captivity, for although governments generally end up agreeing to make the humanitarian gesture expected of them, they usually want to make it in secret, fearing that any concession made in the public eye may be interpreted as a sign of weakness. While confidentiality, contrary to the mistaken belief of certain commentators, is not and never has been one of the ICRC’s
unavowed principles – it will always be merely a means and not an end in itself – it nevertheless is for many activities an operational constraint that can be ignored only at the risk of failure.

On the other hand, however, the ICRC knows that it cannot discharge its mandate on its own. To be successful, it has to mobilize public and government support. The ICRC has always reserved the possibility of appealing to public opinion in the event of serious and duly attested violations of humanitarian rules and when its confidential representations have been in vain.

In those cases it must try to mobilize public opinion and governments, and to do that it has to turn to the press which, in other circumstances, it tries to keep at arm’s length.

Of course, journalists are well aware of this ambivalence and as a rule prefer to work with other organizations that do not face the same difficulties and have no compunction about contacting the press. They criticize the ICRC for casting a veil of secrecy over the atrocities it allegedly does not have the courage to denounce and for keeping its activities secret, supposedly to shield it from criticism. The accusation is all the more telling in that many humanitarian organizations make public denunciations a key factor of their operations and seem perfectly happy to play the role of press agency. The fact remains, however, that if the ICRC wants to mobilize public opinion and governments, if it wants to find the support it needs to ensure that its humanitarian work is effective and not just a cry in the wilderness, it will have to find a new basis for its co-operation with the press and other media. It will above all have to rediscover the virtues of plain speaking, without which it cannot hope to be understood.

Changes in warfare will certainly raise new difficulties, for whereas the law of war stems from the confrontation between armies using more or less similar weapons and methods of warfare, the ICRC is increasingly faced with situations in which the means deployed are completely dissimilar. The Vietnam War and the Afghan conflict were forerunners of situations in which one side uses conventional means against an elusive enemy that melts into the civilian population and employs guerrilla tactics. In future this disparity is likely to be more frequent and there will probably be many more hybrid conflicts that are both internal and international in nature. These new forms of conflict are themselves an obstacle to the application of humanitarian law. The similarity of the weapons and methods used by conventional armies encouraged respect for humanitarian law, each side behaving as it expected the other to behave. Where there is no such similarity humanitarian law is in danger of being completely undermined, since each of the adversaries goes by a different set of rules.

Another eroding factor is the growing interdependence of the ‘Law of Geneva’ and the ‘Law of The Hague’. Nineteenth-century generals could undertake to respect ambulances and army medical services without giving up any military advantage, and the same was true of respect for prisoners of war; but the rules protecting the civilian population, especially those restrict-
ing bombardment and prohibiting direct attacks on civilians, inevitably limit the methods and weapons that belligerents can use. The temptation to disregard these rules may be irresistible if either of the belligerents becomes convinced that by doing so it could avoid defeat or strike its enemy a mortal blow.

The Vietnam War showed plainly that the International Committee could not focus only on the ‘Law of Geneva’ and do nothing to prevent violations of the ‘Law of The Hague’. Any breach of rules concerning the conduct of hostilities inevitably affects the application of humanitarian law. The only solution is to face up to the difficulty of ensuring the application of the ‘Law of The Hague’.

That is not all, however. Humanitarian law exists to protect war victims but relies on the fundamental structure of the state. This raises a serious question. How can individuals be protected by rules primarily applicable to – and benefiting – states? The ICRC was confronted with this difficulty throughout the Second World War, especially as regards the fate of the Jews. As the European Jews had no claim to statehood, the German authorities persisted in refusing them any treaty protection and opposed any ICRC intervention on their behalf. The same difficulty now stands in the way of applying the Geneva Conventions to peoples claiming a national existence but whom their enemies refuse to recognize as a state.

This is a fundamental problem for the ICRC. There is a contradiction between the purpose of its work, which concerns individuals, and the means used, which are legal instruments applicable to states. Unfortunately the ICRC cannot avoid this contradiction, for it is inherent in the very structure of the international community, which is made up of the juxtaposition of sovereign states. And it would be ingenuous to believe that states will be less jealous of their sovereignty in future than they have been in the past.

While it may be difficult to protect individuals against the state of which they are citizens, it is even more difficult and hazardous to conduct humanitarian activities when a state has been plunged into chaos or when its entire administrative structure has broken down, as is the case at present in Liberia, Somalia and Sierra Leone, or as was the case at the beginning of the conflict in Bosnia-Herzegovina. Since its inception, the ICRC has endeavoured to meet its objectives through the states and by relying on them: the creation of national relief societies for wounded soldiers, and the adoption of an international convention to improve the plight of the wounded and sick of armies in the field, are ample proof that the ICRC has done most of its work in the framework of a dialogue with states. Even in situations of civil war, the ICRC has asked that international humanitarian law be applied by analogy and has tried to transpose the operational models followed during conflicts between states. As a rule, it was able to rely on the parties to such conflicts, each of which had a command structure responsible for its subordinates and an organization enabling it to comply with humanitarian rules.
No such thing exists in present-day Liberia, Somalia or Sierra Leone. The systems of government have disappeared. The remnants of power have been grabbed by local chieftains who wage their own wars and hold the civilian population to ransom, while remaining incapable of imposing the least semblance of discipline on the rabble they call their troops.

Humanitarian action is more necessary than ever in failed states, but can it exist at all when warlords pillage relief convoys bringing supplies to the people belonging to their faction and do not allow passage for any convoys to neighbouring areas? Despite the risks run by the ICRC and other institutions to pursue humanitarian work beyond reasonably expected limits, the answer is no. In the long run, the operation will inevitably come to a halt.

These may be exceptional situations that will soon be no more than a bad memory. Or they may be the first symptoms of the collapse of governmental structures that threatens parts of Africa and some of the former socialist countries in eastern Europe. It is too early to say. It all depends on whether the international community is willing to assume its responsibilities and restore order, if need be by force, in countries lapsing into chaos, or whether it will simply abandon those countries to their fate while trying to protect neighbouring countries and stop the cancer from spreading.

However, the most fearsome of all these challenges, and the most dangerous to the very foundations of the ICRC’s work, are those of ideological warfare and total war.

Ideology holds out no promise of a limited truth, as science does. It promises truth without limits, an all-inclusive explanation of mankind and the world, the past and the future. It does not promise a temporary interpretation of the universe that with advancing knowledge might have to be revised, but the ultimate truth which will supposedly outlive the generations and centuries to come.

In any ideology there is an element of messianism and therefore the risk of confrontation. Ideological warfare does not seek merely the triumph of its arms; it also seeks to impose the truth it claims to possess. It aims not only to conquer a territory or gain economic advantage, but to conquer the mind.

Vattel, who may unhesitatingly be regarded as one of the founders of contemporary international law, pointed out that war could not be just on both sides. Since, however, nations are equal and independent and are not entitled to judge each other, he recognized that both belligerents could be of good faith, and that in any cause in which there was room for doubt both parties could have an equal right to resort to arms.9

This margin of tolerance, on which humanitarian law is largely based, is precisely what ideological warfare rejects. Since it claims to be fighting for the truth, it declares that its adversary is necessarily in the wrong. So if he refuses to surrender, why should he be spared? How, it contends, is it possible for humanitarian law to give equal protection to the party that draws the sword without just cause and the party that defends the good cause; how can it protect both the aggressor and the victim of aggression?
Thus the very basis of humanitarian law is challenged by a refusal to admit that the enemy is entitled to protection and respect simply and solely as a human being, irrespective of whether the cause for which he has taken up arms is just or unjust.

Furthermore, ideological warfare will not accept neutrality. How, it argues, is it possible to be neutral between truth and error, between right and wrong?

This attitude challenges the ICRC’s position, just as it challenges its role as a neutral intermediary. This was all too clear in the Vietnam War: the ICRC was blamed not only because it did not condemn the American air raids, but ultimately for refusing to take sides.

The matter does not end here. Since ideological warfare claims to be defending a higher truth it will certainly use this to justify its own violations of the law of war whilst insisting that the enemy should still respect it. Its claim is well known: ‘Why do we need to observe the rules? Our cause is just and the end justifies the means.’ Ideological warfare, then, leads to total war.

Indeed, what characterizes total war is not only that it mobilizes all national energies, but even more conspicuously that its ends and means are unlimited. It is not content to weaken the enemy’s military potential, he must be annihilated. ‘Strike at the enemy wherever you can! No holds barred!’ Thus total war is nothing less than the negation of humanitarian law, the refusal of any limitation of objectives or of the means employed. It is war by everybody against everybody in a paroxysm of blind violence.

The ICRC is not completely powerless against these challenges, even though the means at its disposal appear inadequate in the extreme, compared with the difficulties it has to overcome.

Its greatest asset is unquestionably the mandate entrusted to it by the international community, and recognition by public international law of that mandate together with the competence and prerogatives it needs to discharge it. For even though the International Committee’s ex officio duties and responsibilities are strictly defined, their recognition and the fact that they are enshrined in public international law confer on the ICRC subjective rights for which it is entitled to demand respect, together with the possibility of opening a dialogue with the parties to the conflict and of making its voice heard. Furthermore, its universally recognized right of humanitarian initiative enables it to make any proposal aimed at alleviating the plight of war victims. This mandate also determines the ICRC’s position in the international arena and its character as an institution founded by private initiative but vested with international functions, hence with a degree of international legal personality. The combination of private and international attributes enables it to enter into relations not only with states but also with any group exercising de facto control over war victims, whatever the status of that group in international or domestic law, without such relations affecting the parties’ status. This position has no equivalent on the international scene. It has already enabled the ICRC to break a stalemate on many occasions when other institutions were unable to intervene to any good purpose.
Another consequence of this mandate is the role of neutral intermediary entrusted to the ICRC, a role which is the fruit of a tradition of impartiality carefully nurtured for more than 125 years. There has been no lack of opportunities of measuring its worth. Perhaps the most impressive of them was during the Cuban missile crisis of October 1962, which brought humanity to the brink of World War III. To defuse the crisis caused by the installation of Soviet nuclear missile bases in Cuba and by the naval ‘quarantine’ of Cuba just decreed by President Kennedy, the United States and the USSR agreed to ask neutral observers to inspect the cargoes of Soviet vessels bound for the Caribbean, which the US navy was preparing to intercept. Agreement had still to be reached on an organization that would be asked to appoint the observers and recognized as impartial by all the parties concerned. After various organizations were proposed and rejected the final choice fell on the ICRC, which consented to lend its assistance on condition that all the parties – the United States, the USSR and Cuba – agreed; but a political way out was found before the inspectors the ICRC had begun to recruit could take up their duties.10

Among the ICRC’s other assets are the traditions of which it is the depositary, the Fundamental Principles of which it is the guardian, and its doctrine – its operational principles and policy – whose purpose is not to measure the progress already made or to imprison thought in a strait-jacket of dogma, but to orientate reflection and guide action. The Fundamental Principles and doctrine are not the outcome of speculative reflection isolated from the conduct of operations, but of more than a century’s practical experience. They were born of action and are made for action. What ensures that the International Committee’s decisions remain consistent in all situations and preserves the continuity of its action is its respect for tradition, for the Fundamental Principles and for its own doctrine. It is that too which makes its behaviour predictable – its partners can to some extent anticipate its reactions, secure from unpleasant surprises and sudden changes of mood. And that, ultimately, is the basis of the trust the ICRC enjoys.

Another noteworthy factor is the ICRC’s considerable experience, which comes from its constant presence ‘in the front line’ since the Italo-Ethiopian War (1935–6). In its own specific fields – the work of the Central Tracing Agency, visits to places of detention and relief and repatriation operations – the ICRC is highly qualified, and this is widely recognized and respected. Its representatives are well versed in conducting discreet but effective diplomacy.

Yet another of the ICRC’s major assets is its position within the International Red Cross and Red Crescent Movement, and the support it is entitled to expect from the National Societies and their Federation. Of course, not all the National Societies are equally independent or show the same respect for the Fundamental Principles, and many of them have only limited means. Nevertheless the Red Cross is one of the few popular movements that transcends all borders. Its millions of members and volunteers are an invaluable source of support and goodwill. They are ‘invisible legions’
which the International Committee can mobilize in aid of war victims. None of the large-scale operations conducted by the ICRC in the course of its history could have been carried out without the help of the National Societies and the Federation.

Outside the Movement, the ICRC has to be able to count on the support of all men and women of good will, from heads of state to the humblest of helpers, who feel that they have a duty to their neighbour and are ready to support it in its work and follow its example.

However, the ICRC’s most valuable asset is undoubtedly the idea it embodies and that no human being can really impugn: the conviction that a minimum standard of humanity must be upheld even in the midst of battle, that the wounded enemy must be brought to safety and cared for, that a vanquished foe must be spared and that civilians who are not part of the war must be respected and protected.

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The International Committee’s history is like the drum of a seismograph which records all the crises through which humanity passes. Until the mid-1960s it was easy to identify those crises: that sudden spurt in its activity was due, for instance, to the Korean War, and that one to the Hungarian uprising and the Suez conflict. But for the last thirty years or so, one crisis has followed another without a break and most of them are still unresolved. There is every reason to believe that this will go on and that future shocks will be even more numerous and severe. The ICRC’s mission will be more difficult, but also more necessary, than ever.

Even more than in the past, the International Committee will have to find ways of coping with the challenge of its growth. It will have to adopt management structures and methods suitable for the sizeable organization it has become, without stifling the motivation and spirit of initiative that have made it so dynamic in the past.

It will have to preserve the high level of qualification and competence in international humanitarian law that it is recognized as possessing, while judiciously initiating the consultations and studies required to ensure that the said law keeps pace with the shifting realities of conflict.

The ICRC must not be afraid to act as leader to voluntary agencies endeavouring to aid war victims, but in doing so it must respect their diversity of approach. It must shun any spirit of competition and must not seek to impose its leadership.

It must also strengthen its present co-operation with the National Societies and their Federation, and must not be afraid of exploring new ways of cooperating with its partners within the Movement. It will certainly be called upon to do more than it has done in the past to develop the National Societies of the poorest countries. In this it must not encroach on the prerogatives of the Federation.
By its work to spread knowledge of international humanitarian law, by its negotiations and above all by the vigour of its operations, the International Committee must endeavour to induce governments to restore humanitarian concerns to their rightful place in their scale of values and priorities. This means not only obtaining the diplomatic and financial backing it needs to conduct its operations, but also and above all convincing states that, far from being a mere accessory of political action, humanitarian concerns have to be recognized as part of the decision-making process, since any political decision may have humanitarian repercussions. The ICRC will also have to persuade both states and public opinion that not only the lasting settlement of conflicts but the future of humanity depend on resolving the human tragedies left in the wake of war. Humanitarian matters are therefore an essential part of what should be the foremost concern of governments and peoples alike, namely restoring and maintaining peace.

The fact that the ICRC can assist the victims of conflicts does not mean that the causes of those conflicts should not be sought or that questions should not be raised about the policies of which those conflicts are the result. By the same token, the fact that the states support the work of humanitarian institutions, in particular the ICRC, does not diminish the responsibility some of them bear for the outbreak or continuation of those conflicts.

The ICRC's relief work must therefore be accompanied by constant efforts for a true humanitarian mobilization whose aim would be to bring governments face to face with their responsibilities and induce them to take the humanitarian impact of political decisions into greater account. Indeed, what the ICRC can achieve by its efforts alone pales in comparison to what it can accomplish if it manages to rally the support of governments, the National Societies and public opinion in promoting respect for humanitarian principles. On the scales of history, what the ICRC does carries less weight than what it persuades others to do or to refrain from doing.

Last but not least, the ICRC must remember that the ultimate basis of all its activities is not the positive law evolved from the ingenious compromises usually reached at international conferences, and is not confined within the narrow bounds of legal texts. That basis is provided by the fundamental principles underlying those treaties and by the inalienable rights of the individual, the natural right of all human beings to justice and respect for their dignity, without arbitrary treatment and without adverse distinction of any kind. After all, the ultimate concern of any legal system is to protect the human person and his or her fundamental rights.

War is an act of violence pushed to its utmost bounds; as one side dictates the law to the other, there arises a sort of reciprocal action, which logically must lead to an extreme.11 Clausewitz could write that maxim without a shudder not only because he had been brought up in the harsh school of the Napoleonic Wars, but also
because the limited technology of his age imposed constraints upon warfare and prevented it from ‘leading to an extreme’. Napoleon’s Grande Armée moved at the speed of a foot soldier and the range of his artillery was less than a quarter of a league (about 1.4 km). At a mere five to ten miles from Austerlitz or Waterloo, the thunder of cannon could hardly be heard.

There are no such constraints nowadays. From atomic energy to laser beams, there is no scientific or technical discovery that has not been put to military use. Nuclear missiles can cross oceans in a few minutes and reduce whole cities to ashes. Mankind has provided itself liberally with the means of its own annihilation.

But even if atomic weapons are not used, there is no part of the territory of belligerent states that is not in danger of destruction, nor any part of the population that is safe from the devastating effects of modern war. The Second World War moreover showed that horror could always be piled on horror; the limit was never reached.

Evidently, the ICRC cannot halt this race to self-destruction. It can neither prevent war nor stop it from claiming its victims. But it can alert governments and public opinion to the disastrous consequences of the course pursued, which are all too plain to it – plainer than to anyone else – from its daily work.

Besides coming to their aid, the International Committee must make known the plight of all those who have put their trust in it. It must speak out for all those men, women and children, the wounded and prisoners, whose voice is drowned by the din of battle. It must speak out for the victims of war.

Notes

1 Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne, Imprimerie Fick, Geneva, 1863, p. 10.
5 The growth of the ICRC is shown by the following figures:

<table>
<thead>
<tr>
<th>Year</th>
<th>Headquarters expenditure</th>
<th>Field expenditure</th>
<th>Headquarters staff</th>
<th>Delegates in the field</th>
<th>Locally recruited employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>91*</td>
<td>190*</td>
<td>658</td>
<td>3040</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>149*</td>
<td>446*</td>
<td>620</td>
<td>1106</td>
<td>6481</td>
</tr>
</tbody>
</table>

*in million Swiss francs

These figures show clearly that ICRC growth has been overwhelmingly due to the expansion of work in the field.
6 In July 1982 the ICRC Assembly decided to form a working group which would make concrete proposals to it regarding the controlled growth of the ICRC over the next ten to twelve years. The working group submitted its report in August 1983 under the title: *L’avenir du CICR: Rapport du groupe de travail à l’Assemblée des 1–2 septembre 1983 et propositions de décisions* (The future of the ICRC: Report by the Working Group to the Assembly meeting on 1–2 September 1983, and proposed decisions), document A 374 of 18 August 1983. The present text is largely based on this report, which is an outstanding piece of thinking and forecasting.

7 From this point of view, the ICRC’s new executive structure, adopted on 2 May 1991 and making the Director-General, the Director of Operations and the Director of Law, Principles and Relations with the Movement members of the Executive Board, was to be welcomed. The other members of the Board were the President and permanent Vice-President and two other Assembly members elected by the Assembly (*IRRC*, no. 282, May–June 1991, pp. 315–16). This change – undoubtedly one of the most important in the institution’s history – allowed the Executive Board, which had responsibility for the general conduct of activities, to combine the voluntary service that remains a fundamental part of any relief organization with the professionalism indispensable to the conduct of ICRC operations. There is no doubt that this new executive structure guaranteed greater effectiveness.

On 24 June 1998, the Assembly of the ICRC adopted new Statutes, based on the principle of a clear separation between governance and management. Accordingly, the Directorate, composed of the Director-General, the Director of Operations, the Director of Law and Communication and the Director of Resources, will be the executive body of the ICRC, responsible for applying and ensuring application of the general objectives and institutional strategy defined by the Assembly or the Assembly Council. *IRRC*, no. 324, September 1998, pp. 537–43.


9 ‘War can not be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true.

‘However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent and can not set themselves as judges over one another, it follows that in all cases open to doubt the war carried out by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.’ Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, translation of the original French edition of 1758 by Charles G. Fenwick, Henry Dunant Institute, Geneva and Slatkine Reprints, 1983, vol. II, p. 30 (French); vol. III, p. 247.


APPENDIX 1

TABLE OF SPECIAL AGREEMENTS

The sole purpose of this list is to illustrate the variety of agreements concluded by the International Committee of the Red Cross with other subjects of international law, and of agreements concluded between other subjects of international law and containing provisions of interest to the ICRC. The list is not exhaustive, nor is there a strict definition of what constitutes a special agreement.

The agreements concluded by the ICRC with the other components of the International Red Cross and Red Crescent Movement are not listed, for they are not directly governed by public international law, but in the main by the Movement’s internal regulations.

Final Protocol of the Serbo-Bulgarian Conference which met in Geneva, 14–17 November 1917 (Articles 1, 2 and 8). Bulletin international des Sociétés de la Croix-Rouge, no. 193, January 1918, pp. 28–32 (in French).


Agreement between France and Germany concerning the liberation and repatriation of civilians and the treatment of the population in occupied territories; Agreement between France and Germany concerning prisoners of war, signed at Berne, 26 April 1918 (Article 40). De Martens, Nouveau Recueil général de Traitées, third series, vol. XI, pp. 46–60 (German); The


Agreement between Germany and Hungary with regard to the through transport of their respective prisoners of war, signed at Berlin, 8 May 1920 (Articles 2–4). *League of Nations Treaty Series*, vol. 2, pp. 79–83 (English, French and German).


Agreement constituting an International Commission for the International Tracing Service, signed at Bonn, 6 June 1955; Agreement on the relations


Agreement between the Algerian Government and the ICRC on persons who disappeared in Algeria after the proclamation of the cease-fire, signed at Algiers, 21 February 1963. ICRC Archives, file 275 (12) (French text); *Keesing’s Contemporary Archives*, 29 June–6 July 1963, p. 19496.

Arrangement relating to the exchange of Jordanian and Israeli prisoners of war through the intervention of the International Committee of the Red Cross, 26 June 1967. ICRC Archives, file 210 (171–4); *Keesing’s Contemporary Archives*, 12–19 August 1967, p. 22194.


Agreement between the Hashemite Kingdom of Jordan and the State of Israel on final arrangements for the return of the residents of the West Bank, signed at Allenby Bridge, 6 August 1967. ICRC Archives, file 231 (100); *Keesing’s Contemporary Archives*, 19–26 August 1967, p. 22215.

Agreement on the repatriation of Lebanese and Israeli prisoners of war and civilian internees under ICRC auspices, August 1967. ICRC Archives, file 210 (175–171).

Agreement between the European Economic Community and the ICRC on the supply of cereal products as food aid, 14 May 1969. ICRC Archives, file 280 (186).

Agreement between the Kingdom of Greece and the ICRC on visits to political detainees, 3 November 1969. *International Review of the Red Cross (IRRC)*, no. 105, December 1969, pp. 673–76.
Agreement in the form of an exchange of letters between the European Economic Community and the ICRC on the supply of 600 tonnes of homogenized food for children and 3000 tonnes of soup to victims of the conflict in Nigeria; Agreement between the European Economic Community and the ICRC on the supply of skimmed-milk powder as food aid; Agreement between the European Economic Community and the ICRC on the supply of cereal products as food aid, signed at Brussels, 25 March 1970. ICRC Archives, file 284 F (CEE); *Official Journal of the European Communities*, 19 May 1970, no. L 107, pp. 11 ff.


Agreement in the form of an exchange of letters between the European Economic Community and the ICRC on the supply of 200 tonnes of homogenized food for children and 1000 tonnes of soup as food aid for the disaster-stricken population of East Pakistan, 2 March 1971. ICRC Archives, file 284 F (CEE); *Official Journal of the European Communities*, 14 April 1971, no. L 084, pp. 12 ff.


Agreement between the European Economic Community and the ICRC on the supply of cereals as food aid, signed at Brussels, 8 July 1971. ICRC Archives, file 284 F (CEE); *Official Journal of the European Communities*, 10 July 1971, no. L 154, pp. 31 ff.

Agreement between the European Economic Community and the ICRC extending the delay for the implementation of the Agreement between the European Economic Community and the ICRC on the supply of skimmed-milk powder as food aid, signed at Brussels, 28 September 1971. ICRC Archives, file 284 F (CEE); *Official Journal of the European Communities*, 26 October 1971, no. L 240, pp. 14 ff.

Headquarters agreement between the ICRC and Cameroon, 23 March 1972. ICRC Archives, file 250.


Agreement between the European Economic Community and the ICRC on the supply of cereals as food aid for the people of Bangladesh, signed at Brussels, 6 December 1972. ICRC Archives, file 284 F (CEE); *Official Journal of the European Communities*, 31 December 1972, no. L 299, pp. 29 ff.


Agreement between the European Economic Community and the ICRC on the supply of cereals, butter oil and skimmed-milk powder as food aid, signed at Brussels, 3 February 1975. ICRC Archives, file 284 F (CEE); Official Journal of the European Communities, 24 March 1975, no. L 075, pp. 7 ff.

Headquarters agreement between the ICRC and Togo, 19 February 1975. ICRC Archives, file 250 (in French).

Headquarters agreement between the ICRC and Cyprus, 28 March 1975. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Argentina, 7 July 1975. ICRC Archives, file 250; Boletín Oficial de la República Argentina, 21 July 1978.


Headquarters agreement between the ICRC and Thailand, 19 November 1976. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Lebanon, 1 April 1978. ICRC Archives, file 250.

Headquarters agreement between the ICRC and South Africa, 7 November 1978. ICRC Archives, file 250.

Agreement in the form of exchanges of letters between Israel and the ICRC, on the one hand, the ICRC and the Popular Front for the Liberation of Palestine – General Command, on the other, for the simultaneous release of an Israeli prisoner of war and of a certain number of Arab civilian detainees, 11–13 March 1979. ICRC Archives, file 219 (171).

Agreed minutes of understanding between the Zimbabwe African National Union (ZANU) and the ICRC on the ICRC’s protection and assistance actions in favour of war victims cared for by ZANU, signed at Maputo, 20 March 1979. ICRC Archives, file 280/234 (9–110).

Agreement between Ethiopia and the ICRC concerning the Orthopaedic Centre of Debre Zeit, signed at Debre Zeit, 14 April 1979. ICRC Archives, file 263 (141).

Headquarters agreement between the ICRC and Mozambique, 12 April 1980. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Colombia, 19 May 1980. ICRC Archives, file 250.

Appendix 1

Headquarters agreement between the ICRC and Nicaragua, 5 November 1980. ICRC Archives, file 250.


Headquarters agreement between the ICRC and Zaire, 27 February 1982. ICRC Archives, file 250.

Agreement on technical co-operation between Mozambique and the ICRC in favour of war invalids, signed at Maputo, 17 May 1982. ICRC Archives, file 263 (9).

Agreement between the Union for the Total Independence of Angola (UNITA) and the ICRC on the ICRC’s protection and assistance actions in favour of war victims in Angola, 22 February 1983. ICRC Archives, file 149 (15 UNITA).

Headquarters agreement between the ICRC and Egypt, 1 March 1983. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Somalia, 11 August 1983. ICRC Archives, file 250.


Agreement in the form of exchanges of letters between Israel and the ICRC, on the one hand, the ICRC and the Palestine Liberation Organization, on the other, for the simultaneous liberation of Israeli and Palestinian prisoners, 15–16 November 1983. ICRC Archives, file 210 (175 Misr – 100); Keesing’s Contemporary Archives, February 1984, pp. 32651–2.

Headquarters agreement between the ICRC and Sudan, 8 December 1984. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Chad, 16 February 1985. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Chile, 5 March 1985. ICRC Archives, file 250; Diario Oficial de la República de Chile, CIXth year, Num. 32.412, no. 159.969, 3 March 1986.

Headquarters agreement between the ICRC and the Philippines, 30 April 1985. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Honduras, 31 August 1987. ICRC Archives, file 250; La Gaceta, Diario Oficial de la República de Honduras, CXIth year, no. 25’514, 29 April 1988, pp. 1–3.

Headquarters agreement between the ICRC and Indonesia, 19 October 1987. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Uganda, 29 December 1987. ICRC Archives, file 250.

Memorandum of understanding between the ICRC and UNICEF concerning assistance to children in Southern Sudan, signed at Geneva, 10 January 1989. ICRC Archives, file 280 (179).

Headquarters agreement between the ICRC and Peru, 5 June 1989. ICRC Archives, file 250.


Agreement between the Government of Sudan, the Sudanese Red Crescent and the ICRC for an orthopaedic project in Khartoum, 11 January 1990. ICRC Archives, file 263 (179).

Agreement between Zaire and the ICRC concerning visits to persons detained for reasons of security, signed at Kinshasa, 5 March 1990. ICRC Archives, file 225 (37).


Memorandum of understanding between France, Kuwait, Saudi Arabia, the United Kingdom and the United States of America, and Iraq concerning the repatriation of prisoners of war and the tracing of missing persons, signed at Riyadh, 7 March 1999. ICRC Archives, file 210 (19–70).

Memorandum of understanding between the Ethiopian Government, the Ethiopian Red Cross and the ICRC concerning emergency medical assistance, signed at Addis Ababa, 14 March 1991. ICRC Archives, file 280 (141).

Headquarters agreement between the ICRC and Senegal, 10 May 1991. ICRC Archives, file 250.


Headquarters agreement between the ICRC and Namibia, 28 June 1991. ICRC Archives, file 250.


Agreement between Yugoslavia and Croatia for the release of prisoners, signed at Zagreb, 6 November 1991. ICRC Archives, file 225 (139).


Agreement between Yugoslavia and Croatia relating to the establishment of a protected zone around the hospital of Osijek, signed at Pecs (Hungary), 27 December 1991. ICRC Archives, file 203 (139).

Headquarters agreement between the ICRC and Djibouti, 1 March 1992. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Mali, 14 April 1992. ICRC Archives, file 250.


Memorandum of understanding between the Transitional Government of Ethiopia, the Ethiopian Red Cross Society and the ICRC for the extension of activities concerning the orthopaedic assistance in the Debre Zeit


Agreement between Yugoslavia and Croatia on the liberation of prisoners, signed at Budapest, 7 August 1992. ICRC Archives, file 225 (ex 139).

Agreement between Afghanistan and the ICRC concerning Karte Seh Hospital in Kabul, signed at Kabul, 21 September 1992. ICRC Archives, file 280 (2).


Headquarters agreement between the ICRC and Rwanda, 14 January 1993. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Ivory Coast, 8 February 1993. ICRC Archives, file 250.

Headquarters agreement between the Swiss Confederation and the ICRC, signed at Berne, 19 March 1993. IRRC, no. 293, March–April 1993, pp. 150–60 (English); Recueil officiel des lois fédérales, 1993, no. 18, 11 May 1993, pp. 1504–10 (French).

Memorandum of understanding between Sudan and the ICRC, signed at Khartoum, 21 March 1993. ICRC Archives, file 280 (179).

Framework partnership contract between the European Economic Community and the ICRC on operations financed by the European Economic Community, signed at Brussels, 18 May 1993. ICRC Archives, file 280 (00).

Agreement between Iraq and the ICRC on the ICRC’s water and sanitation programme, signed at Baghdad, 12 June 1993. ICRC Archives, file 280 (70).

Headquarters agreement between the ICRC and Uzbekistan, 29 June 1993. ICRC Archives, file 250.

Agreement between Iran and the ICRC on registration and tracing of persons captured or missing as a consequence of the war between Iraq and Iran, signed at Berne, 7 September 1993. ICRC Archives, file 210 (71–70).

Headquarters agreement between the ICRC and Burundi, 8 September 1993. ICRC Archives, file 250.

Co-operation agreement between the Myanmar Red Cross Society, the Government of Myanmar and the ICRC concerning the rehabilitation of
amputees, signed at Yangon, 9 September 1993. ICRC Archives, file 263 (24).

Headquarters agreement between the ICRC and Armenia, 5 November 1993. ICRC Archives, file 250.

Agreement between Iraq and the ICRC on the rehabilitation of amputees, signed at Baghdad, 14 November 1993. ICRC Archives, file 263 (70).

Agreement in the form of an exchange of letters between Mexico and the ICRC on relief operations for the civilian population and visits to places of detention in the State of Chiapas (Mexico), 17 January 1994. ICRC Archives, file 252 (55).


Headquarters agreement between the ICRC and Pakistan, 21 March 1994. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Georgia, 11 April 1994. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Croatia, 20 April 1994. ICRC Archives, file 250.

Agreement between Vietnam and the ICRC concerning the rehabilitation of war amputees, signed at Ho Chi Minh City, 3 May 1994. ICRC Archives, file 263 (69).

Headquarters agreement between the ICRC and Yugoslavia, 14 June 1994. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Cambodia, 24 June 1994. ICRC Archives, file 250.

Memorandum of understanding between the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority and the ICRC on the presence and activities of the ICRC in the areas and in regard to matters under the jurisdiction of the Palestinian Authority, signed at Gaza, 13 July 1994. ICRC Archives, file 252 (171).


Letter of understanding between Eritrea, the Red Cross Society of Eritrea and the ICRC concerning assistance to the Asmara Orthopaedic Workshop, signed at Asmara, 28 September 1994. ICRC Archives, file 263 (140).
Agreement between Rwanda and the ICRC regarding visits by the ICRC to persons held in Rwandan places of detention, signed at Kigali, 26 December 1994. ICRC Archives, file 225 (194).

Co-operation agreement between Azerbaijan and the ICRC for the prosthetic-orthopaedic rehabilitation centre in Baku, signed at Baku, 29 December 1994. ICRC Archives, file 263 (258).


Agreement between Iraq and the ICRC on the ICRC’s water and sanitation programme, signed at Baghdad, 20 March 1995. ICRC Archives, file 280 (70).

Agreement in the form of an exchange of letters between the International Criminal Tribunal for the Former Yugoslavia and the ICRC regarding visits to detainees held under the authority of the International Criminal Tribunal for the Former Yugoslavia, 28 April/5 May 1995. ICRC Archives, file 229 (00-ex 139).

Headquarters agreement between the ICRC and the Republic of Congo (Brazzaville), 17 May 1995. ICRC Archives, file 250.

Memorandum of understanding between India and the ICRC concerning visits to persons detained in connection with the prevailing situation in Jammu and Kashmir, signed at New Delhi, 22 June 1995. ICRC Archives, file 225 (66).

Agreement in the form of an exchange of letters between the Council of Europe and the ICRC, 26 June/20 July 1995. ICRC Archives, file 132 CDE.

Co-operation agreement between Chile and the ICRC, signed at Santiago de Chile, 10 November 1995. ICRC Archives, file 141 (33).

Headquarters agreement between the ICRC and Ukraine, 5 December 1995. ICRC Archives, file 250.


Agreement between Colombia and the ICRC concerning visits to places of detention, signed at Bogota, 16 February 1996. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Mali, 16 April 1996. ICRC Archives, file 250.
Co-operation agreement between the Organization of American States and the ICRC, signed at Washington DC, 10 May 1996. ICRC Archives, file 132 OEA.

Headquarters agreement between the ICRC and Yemen, 16 July 1996. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Azerbaijan, 29 July 1996. ICRC Archives, file 250.

Memorandum of understanding between the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority and the ICRC on the presence and activities of the ICRC in the areas and in regard to matters under the jurisdiction of the Palestinian Authority, signed at Gaza, 1 September 1996. ICRC Archives, file 250.

Memorandum of understanding between Bahrain and the ICRC mandating ICRC visits to prisoners in Bahrain, signed at Manama, 28 October 1996. ICRC Archives, file 225 (232).

Agreement between Bolivia and the ICRC on visits to detainees, signed at La Paz, 13 March 1997. ICRC Archives, file 141 (26).

Memorandum of understanding between Rwanda and the ICRC concerning maintenance work on water and sanitation systems and kitchens in prisons in Rwanda, signed at Kigali, 28 May 1997. ICRC Archives, file 431-321 RW.


Co-operation agreement between Azerbaijan and the ICRC for the prosthetic-orthopaedic centre in Baku, signed at Baku, 18 July 1997. ICRC Archives, file 463–1/AZ.


Technical co-operation agreement between Peru and the ICRC for orthopaedic assistance to war invalids, signed at Lima, 1 August 1997. ICRC Archives, file 463.1-01/PE.

Agreement in the form of an exchange of letters between the Food and Agriculture Organization and the ICRC, 10 September/3 October 1997. ICRC Archives, file 331.61-01.

Technical co-operation agreement between Nicaragua and the ICRC for orthopaedic assistance to war invalids, signed at Managua, 17 September 1997. ICRC Archives, file 463.1-01/N.

Co-operation agreement between Iraq and the ICRC on orthopaedic activities, signed at Baghdad, 14 October 1997. ICRC Archives, file 463.1–13/IQ.
Agreements between Albania and the ICRC on humanitarian activities for detained or imprisoned persons in Albania, signed at Tirana, 3, 9 and 25 October 1997. ICRC Archives, file 431–2/AL.

Agreement between Ukraine and the ICRC on co-operation in the field of dissemination of the law of armed conflicts among the personnel of the Armed Forces of Ukraine, signed at Kiev, 6 February 1998. ICRC Archives, file 516.1–2/UA.


Agreement between Iran and Iraq on the repatriation of prisoners of war and civilian internees, signed at Teheran, 10 March 1998. ICRC Archives, file 432–146/IR/IQ.

Memorandum of understanding between Cambodia and the ICRC on visits to persons deprived of freedom, signed at Phnom Penh, 20 March 1998. ICRC Archives, file 431–4 KH.

Headquarters agreement between the ICRC and Bosnia-Herzegovina, 26 March 1998. ICRC Archives, file 250.

Co-operation agreement between Georgia and the ICRC for the tuberculosis control project inside the penitentiary system, signed at Tbilisi, 31 May 1998. ICRC Archives, file 461–11/GE.

Agreement of co-operation between Uganda and the ICRC for the implementation of a programme of fabrication of orthopaedic devices for war disabled and other handicapped persons in Uganda, 24 July 1998. ICRC Archives, file 463–2/UG.

Co-operation agreement between the Central-American Parliament (PARLACEN) and the ICRC, signed at San Salvador, 22 September 1998. ICRC Archives, file 332-99/12.

Headquarters agreement between the ICRC and Turkmenistan, 17 November 1998. ICRC Archives, file 250.

Agreement between the Congolese Movement for Democracy (Rassemblement congolais pour la démocratie) and the ICRC on visits to places of detention, signed at Goma (Democratic Republic of Congo), 29 October 1998. ICRC Archives, file 431-73/CD.


Headquarters agreement between the ICRC and Macedonia, 24 February 1999. ICRC Archives, file 250.

Headquarters agreement between the ICRC and Cameroon, 31 March 1999. ICRC Archives, file 250.
Headquarters agreement between the ICRC and Belgium, 19 April 1999. ICRC Archives, file 250.

Framework partnership contract between the European Community and the ICRC on the financing of humanitarian operations, signed at Brussels, 20 April 1999. ICRC Archives, file 612.2–211.

Agreement of collaboration between Sudan and the ICRC for the orthopaedic programme in Khartoum, signed at Khartoum, 11 May 1999. ICRC Archives, file 463–2/SO.
APPENDIX 2

COMPARATIVE TABLE OF AREAS OF COMPETENCE OF THE PROTECTING POWERS AND OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

NB When the Geneva Conventions or Protocol I provide for the exchange of communications between parties to a conflict, but without specifying the channel to be used, I have considered the Protecting Powers and the ICRC to be equally competent to assume that task.

<table>
<thead>
<tr>
<th>Article</th>
<th>Competence of the Protecting Powers</th>
<th>Competence of the ICRC</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Joint competence of the Protecting Powers and of the ICRC</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>GENEVA CONVENTIONS OF 12 AUGUST 1949</strong></td>
<td></td>
</tr>
</tbody>
</table>

**Articles Common to All Four Conventions**

<table>
<thead>
<tr>
<th>Article</th>
<th>Competence of the Protecting Powers</th>
<th>Competence of the ICRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>In the case of armed conflict not of an international character, the International Committee of the Red Cross may offer its services to the parties to the conflict.</td>
<td></td>
</tr>
<tr>
<td>8/8/8/9</td>
<td>The Conventions shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the parties to the conflict. For this purpose, the Protecting Powers may appoint delegates or representatives. The parties to the conflict shall facilitate the task of the delegates or representatives. These delegates or representatives shall not exceed their mission.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article</th>
<th>Competence of the Protecting Powers</th>
<th>Competence of the ICRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>9/9/9/10</td>
<td>The provisions of the Conventions constitute no obstacle to the humanitarian</td>
<td></td>
</tr>
</tbody>
</table>

1044
<table>
<thead>
<tr>
<th>Section</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/10/10/11 § 3</td>
<td>If protected persons do not benefit by the activities of a Protecting Power, the ICRC may offer to assume the humanitarian functions normally performed by Protecting Powers.</td>
</tr>
<tr>
<td>11/11/11/12</td>
<td>The Protecting Powers shall lend their good offices with a view to settling any disagreement as to the application or interpretation of the Conventions. For this purpose they may propose a meeting of the parties to the conflict. The parties to the conflict are bound to give effect to this proposal. A person delegated by the ICRC may take part in such a meeting.</td>
</tr>
<tr>
<td>48/49/128/145</td>
<td>The parties to the conflict shall communicate to each other, through the Protecting Powers, their official translations of the Conventions, as well as the laws and regulations they have adopted to ensure the application thereof.</td>
</tr>
</tbody>
</table>

**FIRST GENEVA CONVENTION**

<table>
<thead>
<tr>
<th>Section</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>Transmission through the Protecting Powers and the ICRC’s Central Tracing Agency (CTA) of information making it possible to identify the wounded, sick and dead; transmission of death certificates or duly authenticated lists; transmission of one half of any double identity disc, last wills and articles of value found on the dead.</td>
</tr>
<tr>
<td>17 § 4</td>
<td>Transmission of information enabling graves to be located and the identity of the dead interred therein to be established; such information shall be transmitted during hostilities or, at the latest, at the end of hostilities.</td>
</tr>
</tbody>
</table>
The Protecting Powers and the ICRC are invited to lend their good offices in order to facilitate the institution and recognition of hospital zones and localities.

Each party to the conflict shall notify to the adverse party, before actually employing them, the names of National Red Cross Societies and of other voluntary aid societies duly recognized and authorized to render assistance to the medical service of its armed forces. (Note: the Convention does not specify the channel to be used for such notification.)

The party to the conflict which accepts the assistance of a recognized aid society of a neutral country is bound to notify the adverse party thereof before making any use of it. (Note: the Convention does not specify the channel to be used for such notification.)

The parties to the conflict shall inform each other, at the outbreak of hostilities, of the model of the identity cards issued to medical personnel, to chaplains attached to the armed forces and to members of aid societies authorized to lend their assistance to the armed forces’ medical services. (Note: the Convention does not specify the channel to be used for such communication.)

The ICRC and its delegates shall be permitted to make use, at all times, of the emblem of the red cross.

### SECOND GENEVA CONVENTION

Transmission through the Protecting Powers or the CTA of information making it possible to identify shipwrecked, wounded, sick or dead persons; transmission of death certificates or duly authenticated lists; transmission of one half of any double identity disc, last wills and articles of value found on the dead.

Transmission of information enabling graves to be located and the identity of the dead interred therein to be established; such information shall be transmitted during hostilities or, at the latest, at the end of hostilities.

Notification of the commissioning of military hospital ships. (Note: the Convention does not specify the channel to be used for such notification.)

Notification of the use of hospital ships utilized by National Red Cross Societies, officially recognized aid societies or private persons belonging to a party to the conflict. (Note: the Convention does not specify the channel to be used for such notification.)
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<tr>
<th>Appendix 2</th>
<th>1047</th>
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</table>

| 25 | Notification of the use of hospital ships utilized by National Red Cross Societies, officially recognized aid societies or private persons of neutral countries. (Note: the Convention does not specify the channel to be used for such notification.) |
| 42 § 3 | The parties to the conflict shall inform each other, at the outbreak of hostilities, of the model of the identity cards issued to the religious, medical and hospital personnel of hospital ships and to their crews. (Note: the Convention does not specify the channel to be used for such notification.) |

**THIRD GENEVA CONVENTION**

<p>| 12 | If prisoners of war (POWs) are transferred from one detaining power to another power which fails to meet its obligations under the Convention, the capturing power shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the POWs. Such requests must be complied with. |
| 23 § 3 | Notification, through the Protecting Powers, of the geographical location of POW camps. |
| 30 § 4 | Forwarding to the CTA of a duplicate of the medical certificate indicating the nature of a prisoner’s illness or injury, and the duration and kind of treatment received (original given to the prisoner). |
| 43 | The parties to the conflict shall notify each other of military titles and ranks in order to ensure equality of treatment between prisoners of equivalent rank. (Note: the Convention does not specify the channel to be used for such notification.) |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>54 § 2</td>
<td>Transmission to the CTA of a duplicate of the medical certificate issued to prisoners of war who sustain accidents in connection with work, or who contract a disease in the course or in consequence of their work.</td>
</tr>
<tr>
<td>56 § 3</td>
<td>The POW camp commander shall keep an up-to-date record of the labour detachments that are administratively part of his camp, and shall communicate it to the delegates of the Protecting Power or of the ICRC who visit the camp.</td>
</tr>
<tr>
<td>58 § 1</td>
<td>Determination, in agreement with the Protecting Power, of the maximum amount of money that POWs may have in their possession.</td>
</tr>
<tr>
<td>60 § 3</td>
<td>The detaining power may not, without the consent of the Protecting Power, definitively reduce the amounts of money allocated to POWs as advances of pay.</td>
</tr>
<tr>
<td>62 § 1</td>
<td>The detaining power shall inform the POWs’ power of origin, through the Protecting Power, of the rate of daily working pay.</td>
</tr>
<tr>
<td>63 § 3</td>
<td>Assistance by the Protecting Power to facilitate the remittance of payments by POWs to persons for whom they are responsible.</td>
</tr>
<tr>
<td>65 § 2</td>
<td>The representatives of the Protecting Powers shall be allowed to inspect POW accounts during their visits to camps.</td>
</tr>
<tr>
<td>65 § 4</td>
<td>The parties to the conflict may notify each other at specific intervals, through the Protecting Power, of the amounts in the POWs’ accounts.</td>
</tr>
<tr>
<td>§ 1</td>
<td>Notification, through the Protecting Powers, of credit balances payable to POWs.</td>
</tr>
<tr>
<td>§ 1</td>
<td>Communication to the POW’s power of origin, through the Protecting Power, of any claim by a POW for compensation in respect of any injury or other disability arising from work.</td>
</tr>
<tr>
<td>§ 2</td>
<td>Transmission to the POW’s power of origin, through the CTA, of a duplicate of any certification regarding his personal effects or monies impounded at the beginning of captivity and not returned to him at the time of his repatriation.</td>
</tr>
<tr>
<td>69</td>
<td>Notification to the POWs’ respective power of origin, through the Protecting Power, of steps taken to maintain their relations with the outside world.</td>
</tr>
<tr>
<td>70</td>
<td>Transmission of capture cards to the CTA.</td>
</tr>
<tr>
<td>71</td>
<td>The detaining power may not, without the consent of the Protecting Power, limit the number of letters and cards sent by POWs to less than the minimum laid down in the Convention.</td>
</tr>
<tr>
<td>72 § 3</td>
<td>The detaining power may not restrict relief shipments intended for POWs, except where such restriction is proposed by the Protecting Power in the interest of the prisoners themselves.</td>
</tr>
<tr>
<td>72 § 3</td>
<td>The ICRC may limit its own relief shipments to POWs if means of transport or communication are overstrained.</td>
</tr>
<tr>
<td>Section</td>
<td>Text</td>
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</tr>
<tr>
<td>73 § 3</td>
<td>The representatives of the Protecting Power and those of the ICRC have the right to supervise the distribution, to the intended recipients, of any collective shipments that they are responsible for forwarding to prisoners of war.</td>
</tr>
<tr>
<td>74 § 2</td>
<td>Correspondence and relief shipments forwarded through the CTA shall be exempt from any postal dues.</td>
</tr>
<tr>
<td>75</td>
<td>The Protecting Powers and the ICRC may ensure the conveyance of capture cards, correspondence and individual or collective relief shipments, as well as legal instruments, papers or documents intended for POWs or despatched by them, by organizing special means of transport. Such transport may be used to convey correspondence, lists and reports exchanged between the CTA and the National Information Bureaux. Such transport may be used to convey correspondence and reports exchanged by the Protecting Powers and the ICRC either with their own delegates or with the parties to the conflict.</td>
</tr>
<tr>
<td>77 § 1</td>
<td>The Protecting Powers and the CTA may ensure the transmission of legal instruments, papers and documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.</td>
</tr>
<tr>
<td>78</td>
<td>The representatives of the Protecting Powers have the right to receive the requests or reports addressed to them by POWs or their representatives.</td>
</tr>
<tr>
<td>79 § 1 and 2</td>
<td>In all places where there are POWs, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, prisoners’ representatives entrusted with representing them before the military authorities, the Protecting Powers, the ICRC and any other organization which may assist them. In camps for officers or in mixed camps, the senior officer among the POWs shall be recognized as the camp prisoners’ representative.</td>
</tr>
<tr>
<td>Section</td>
<td>Paragraph</td>
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<td>79 § 4</td>
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<td>81 § 4</td>
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<td>81 § 6</td>
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<td>96 § 5</td>
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</tr>
<tr>
<td>103 § 3</td>
<td>Prisoners of war in confinement awaiting trial have the right to make requests or complaints to the representatives of the Protecting Power. The representatives of the Protecting Powers and those of the ICRC have the right to visit POWs in confinement while awaiting trial and to interview them without witnesses.</td>
</tr>
<tr>
<td>104</td>
<td>The detaining power shall notify the Protecting Power, at least three weeks before the opening of the trial, of any judicial proceedings instituted against a POW; failing this notification, the trial cannot take place.</td>
</tr>
<tr>
<td>105 § 2</td>
<td>If a POW against whom judicial proceedings have been instituted fails to choose an advocate for his defence, the Protecting Power shall find one for him.</td>
</tr>
<tr>
<td>105 § 5</td>
<td>In the event of judicial proceedings against a POW, the representatives of the Protecting Power have the right to attend the trial of the case, unless, exceptionally, this is held <em>in camera</em> in the interest of state security. In such a case the detaining power shall advise the Protecting Power accordingly.</td>
</tr>
<tr>
<td>107</td>
<td>The detaining power shall notify the Protecting Power of any judgment and sentence pronounced upon a POW.</td>
</tr>
<tr>
<td>108 § 3</td>
<td>Sentenced POWs have the right to make requests or complaints to the representatives of the Protecting Power. The representatives of the Protecting Powers and those of the ICRC have the right to visit POWs serving their sentence and to interview them without witnesses.</td>
</tr>
<tr>
<td>Section</td>
<td>Text</td>
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<tr>
<td>120 § 1</td>
<td>At the request of a POW and, in all cases, after death, the detaining power shall transmit his will to the Protecting Power; a certified copy thereof shall be sent to the CTA.</td>
</tr>
<tr>
<td>121</td>
<td>The Protecting Power shall be informed immediately of every death or serious injury of a POW caused or suspected to have been caused by a sentry, another prisoner, or any other person, as well as any death the cause of which is unknown. A report including statements by witnesses shall be forwarded to the Protecting Power.</td>
</tr>
<tr>
<td>122</td>
<td>The detaining power shall send the Protecting Power and the CTA full particulars of the identity of captured, transferred, released, repatriated, escaped, hospitalized or deceased prisoners, as well as information concerning the state of health of sick and wounded prisoners, and personal valuables left by prisoners who have been repatriated or released, or who have escaped or died.</td>
</tr>
<tr>
<td>123</td>
<td>The ICRC shall offer its services to the powers concerned to organize a Central Information Agency [now the CTA]. The function thereof shall be to collect all information it can obtain on POWs through official or private channels, and to transmit it to their power of origin.</td>
</tr>
<tr>
<td>124</td>
<td>The CTA shall be exempt from postal charges.</td>
</tr>
<tr>
<td>125</td>
<td>The parties to the conflict shall recognize and respect at all times the special position of the ICRC in the field of relief work.</td>
</tr>
<tr>
<td>126</td>
<td>The delegates of the Protecting Powers and those of the ICRC have the right to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and to interview the prisoners without witnesses.</td>
</tr>
</tbody>
</table>
### The ICRC and the Protection of War Victims

<table>
<thead>
<tr>
<th>Annex II Art. 2</th>
<th>The ICRC shall appoint the neutral members of the Mixed Medical Commissions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annex II Art. 5</td>
<td>If the ICRC cannot arrange for the appointment of the neutral members of the Mixed Medical Commissions, this shall be done by the Protecting Power.</td>
</tr>
<tr>
<td>Annex II Art. 8</td>
<td>The ICRC shall settle the terms of service of the neutral members of the Mixed Medical Commissions.</td>
</tr>
<tr>
<td>Annex II Art. 11</td>
<td>The Mixed Medical Commission shall communicate its decisions to the detaining power, the Protecting Power and the ICRC.</td>
</tr>
<tr>
<td>Annex III Art. 9</td>
<td>The representatives of the Protecting Powers and those of the ICRC have the right to ensure that relief supplies they are responsible for forwarding are distributed to the addressees.</td>
</tr>
</tbody>
</table>

### FOURTH GENEVA CONVENTION

**General Protection of Populations against Certain Consequences of War**

14 § 3 The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the establishment and recognition of hospital and safety zones and localities.

15 § 1 Any party to the conflict may, through a neutral state or some humanitarian organization, propose to the adverse party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the wounded and sick, combatants or non-combatants, as well as civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.
23 § 3 Any state which allows the passage of consignments of medical and hospital stores, objects necessary for religious worship, essential foodstuffs, clothing and tonics intended only for civilians of another High Contracting Party, even if the latter is its adversary, may make such permission conditional on their distribution to the intended beneficiaries being made under the local supervision of the Protecting Powers.

25 § 2 If postal services are disrupted, the parties to the conflict concerned shall apply to a neutral intermediary, such as the CTA, and shall decide in consultation with it how to ensure the exchange of news of a strictly personal nature.

26 The parties to the conflict shall encourage the work of organizations engaged on facilitating enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible.

### Provisions Relating both to the Territories of the Parties to the Conflict and to Occupied Territories

30 § 1 Protected persons shall have every facility for contacting the Protecting Powers and the ICRC, which shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.
### Aliens in the Territory of a Party to the Conflict

<table>
<thead>
<tr>
<th>§</th>
<th>Description</th>
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<tbody>
<tr>
<td>35</td>
<td>If protected persons (here, aliens in the territory of a party to the conflict) are refused permission to leave the said party’s territory, the representatives of the Protecting Power shall, unless reasons of security prevent it or the persons concerned object, be given the reasons for refusal of permission to leave and the names of the persons concerned.</td>
</tr>
<tr>
<td>39</td>
<td>Protected persons may receive allowances from their home country, the Protecting Power or the ICRC.</td>
</tr>
<tr>
<td>40</td>
<td>Protected persons compelled to work shall have every facility for making complaints to the Protecting Powers and to the ICRC.</td>
</tr>
<tr>
<td>42</td>
<td>If any protected persons, acting through the representatives of the Protecting Power, voluntarily demand internment, they shall be interned by the power in whose hands they may be.</td>
</tr>
<tr>
<td>43</td>
<td>The Protecting Power shall be informed of the names of any protected persons who have been interned or placed in assigned residence, and of any judicial or administrative decisions taken concerning those persons.</td>
</tr>
<tr>
<td>45</td>
<td>If protected persons are transferred to another power and that power fails to meet its obligations under the Convention, the first power shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such requests must be complied with.</td>
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<td>§</td>
<td>Clause</td>
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<td>49</td>
<td>§ 4</td>
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<td>52</td>
<td>§ 1</td>
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<td>55</td>
<td>§ 3</td>
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<td>59</td>
<td>§ 1–2</td>
</tr>
<tr>
<td>59</td>
<td>§ 4</td>
</tr>
<tr>
<td></td>
<td>The occupying power is not permitted to divert relief consignments from their intended purpose, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.</td>
</tr>
<tr>
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</tr>
<tr>
<td>60</td>
<td>The occupying power is not permitted to divert relief consignments from their intended purpose, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.</td>
</tr>
</tbody>
</table>
| 61 § 1 | The relief consignments intended for the population of occupied territories shall be distributed with the cooperation and under the supervision of the Protecting Power.  

By agreement between the occupying power and the Protecting Power, the duty of supervising the distribution of relief consignments may be delegated to the ICRC. |
| 71 | The occupying power shall inform the Protecting Power of any proceedings instituted against protected persons. |
| 72 § 2 | If a prisoner fails to choose an advocate or counsel, the Protecting Power shall provide him with one. |
| 74 § 1 | Representatives of the Protecting Power have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the occupying power. |
| 74 § 2 | The occupying power shall communicate to the Protecting Power any judgments rendered, together with the relevant grounds. |
No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment.

Protected persons who are detained have the right to be visited by delegates of the Protecting Powers and those of the ICRC.

Protected persons made subject to assigned residence and thus required to leave their homes shall be able to receive allowances from their home country, the Protecting Powers or the ICRC.

**Treatment of Internees (in the Territory of the Parties to the Conflict or in Occupied Territory)**

<table>
<thead>
<tr>
<th>Section</th>
<th>Text</th>
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<tbody>
<tr>
<td>83 § 2</td>
<td>The detaining power shall give the enemy powers, through the intermediary of the Protecting Powers, full information regarding the geographical location of places of internment.</td>
</tr>
<tr>
<td>91 § 4</td>
<td>Transmission to the CTA of the duplicate of any certificate issued to an internee, at his request, showing the nature of his illness or injury, and the nature of the treatment given.</td>
</tr>
<tr>
<td>96</td>
<td>The commandant of a place of internment shall communicate to the delegates of the Protecting Power and of the ICRC the list of labour detachments that are administratively part of that place of internment.</td>
</tr>
<tr>
<td>98 § 2</td>
<td>Internees may receive allowances from the power to which they owe allegiance, the Protecting Powers, and from any other organizations that may assist them.</td>
</tr>
<tr>
<td>98 § 3</td>
<td>A statement of each internee’s account shall be given to the Protecting Power on request.</td>
</tr>
<tr>
<td>101</td>
<td>Internees have the right to apply to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment. The Internee Committees may send periodic reports to the representatives of the Protecting Power.</td>
</tr>
<tr>
<td>102 § 1</td>
<td>In every place of internment, the internees shall freely elect by secret ballot, every six months, the members of a committee empowered to represent them before the detaining power and the Protecting Power and the ICRC.</td>
</tr>
<tr>
<td>102 § 2</td>
<td>The reasons for any refusals or dismissals of members of the Internee Committee shall be communicated to the Protecting Powers concerned.</td>
</tr>
<tr>
<td>104 § 3</td>
<td>Members of Internee Committees shall be given every facility to communicate by post and telegraph with the detaining authorities, the Protecting Powers, the ICRC and their delegates.</td>
</tr>
<tr>
<td>105</td>
<td>The detaining power shall inform the Protecting Power of the measures taken to maintain internees’ relations with the outside world.</td>
</tr>
<tr>
<td>106</td>
<td>Every internee shall be enabled to send an internment card to the CTA.</td>
</tr>
<tr>
<td>108 § 2</td>
<td>Should it be necessary to limit the quantity of relief shipments intended for internees, the Protecting Power and the ICRC must be notified thereof.</td>
</tr>
<tr>
<td>109 § 3</td>
<td>The representatives of the Protecting Power or of the ICRC responsible for the forwarding of collective relief shipments have the right to supervise their distribution to the recipients.</td>
</tr>
<tr>
<td>110 § 2</td>
<td>Correspondence and relief shipments forwarded through the CTA shall be exempt from any postal dues.</td>
</tr>
<tr>
<td>111</td>
<td>The Protecting Powers and the ICRC may ensure the conveyance of internment cards, correspondence and individual or collective relief, as well as legal instruments, papers or documents intended for internees or despatched by them, by organizing special means of transport. Such transport may be used to convey correspondence, lists and reports exchanged between the CTA and the National Information Bureaux. Such transport may be used to convey correspondence and reports exchanged by the Protecting Powers and the ICRC either with their own delegates or with the parties to the conflict.</td>
</tr>
<tr>
<td>113 § 1</td>
<td>Transmission, through the Protecting Powers and the CTA, of wills, powers of attorney or other documents intended for internees or despatched by them.</td>
</tr>
<tr>
<td>123 § 5</td>
<td>A record of disciplinary punishments shall be maintained by the commandant of a place of internment and made available for inspection by representatives of the Protecting Power.</td>
</tr>
<tr>
<td>125 § 3</td>
<td>The representatives of the Protecting Powers and those of the ICRC have the right to visit internees undergoing disciplinary punishment and to interview them without witnesses.</td>
</tr>
<tr>
<td>126</td>
<td>If judicial proceedings are instituted against internees in the national territory of the detaining power, the Protecting Power has the same rights and duties as those provided for in the event of proceedings against protected persons in occupied territory (cf. Articles 71 to 76): it must be notified of the proceedings and the charges preferred; it must provide an advocate or counsel for any internees who do not have one; its representatives have the right to attend the trial; and it must be informed of any sentences handed down. Likewise, a six-month suspension period must elapse between notification and execution of the death sentence. The representatives of the Protecting Powers and those of the ICRC have the right to visit internees who have been sentenced and to interview them without witnesses.</td>
</tr>
<tr>
<td>129 § 3</td>
<td>Transmission to the Protecting Power and to the CTA of copies of death certificates of internees.</td>
</tr>
<tr>
<td>130 § 3</td>
<td>Transmission to the Protecting Power and to the CTA of lists of graves of deceased internees and all particulars necessary for the latter’s identification, as well as the exact location of their graves.</td>
</tr>
<tr>
<td>131</td>
<td>The Protecting Power shall be informed immediately of every death or serious injury of an internee caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown. A report including the evidence of witnesses shall be forwarded to the Protecting Power.</td>
</tr>
<tr>
<td>132</td>
<td>The parties to the conflict shall endeavour, during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time. (Note: the Convention does not specify the channel to be used to exchange communications for the conclusion of such agreements.)</td>
</tr>
<tr>
<td>137 § 1</td>
<td>The detaining power shall transmit to the power of origin of the concerned persons, through the Protecting Power and the CTA, full information about the identity and state of health of all persons who have been taken into custody, placed in assigned residence, or interned, unless the transmission of such information might be detrimental to the person concerned or to his or her relatives.</td>
</tr>
<tr>
<td>137 § 2</td>
<td>Even in cases where the transmission of information identifying a person might be detrimental to that person or to his or her relatives, the information may not be withheld from the CTA which, upon being notified of the circumstances, will take the necessary precautions.</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
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<tr>
<td>139</td>
<td>Transmission, through the CTA, of personal valuables left by internees, in particular those who have been repatriated or released, or who have escaped or died.</td>
</tr>
<tr>
<td>140</td>
<td>The ICRC shall offer its services to the powers concerned to organize a Central Information Agency [now the CTA]. The function of the CTA shall be to collect all information it can obtain through official or private channels concerning persons who have been taken into custody, placed in assigned residence or interned, and to transmit it to their countries of origin, except in cases where such transmission might be detrimental to the persons whom the said information concerns.</td>
</tr>
<tr>
<td>141</td>
<td>The CTA shall enjoy free postage.</td>
</tr>
<tr>
<td>142</td>
<td>The parties to the conflict shall recognize and respect at all times the special position of the ICRC in the field of relief work.</td>
</tr>
<tr>
<td>143</td>
<td>Delegates of the Protecting Powers and those of the ICRC have the right to go to all places where protected persons are, particularly to places of internment, detention and work, and to interview the protected persons without witnesses.</td>
</tr>
<tr>
<td>Annex I Articles 8 and 10</td>
<td>The Protecting Powers may be called upon to nominate persons eligible to be members of the commissions responsible for ascertaining whether safety zones fulfil the requisite conditions.</td>
</tr>
<tr>
<td>Annex II Article 8</td>
<td>The representatives of the Protecting Powers and those of the ICRC shall have the right to ensure that supplies which they are responsible for forwarding are distributed to the intended recipients.</td>
</tr>
<tr>
<td>§</td>
<td>Article</td>
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</tr>
<tr>
<td>2c</td>
<td>Definition of ‘Protecting Power’: ‘Protecting Power’ means a neutral state which has been designated by a party to the conflict and accepted by the adverse party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and Protocol I.</td>
</tr>
<tr>
<td>5 § 1 and 2</td>
<td>Each party to the conflict shall appoint a Protecting Power and shall permit the activities of the Protecting Power appointed by the adverse party.</td>
</tr>
<tr>
<td>5 § 3</td>
<td>If there is no Protecting Power, the ICRC shall offer its good offices with a view to the designation of a Protecting Power.</td>
</tr>
<tr>
<td>5 § 4</td>
<td>If a Protecting Power has not been designated, the ICRC may offer its good offices to act as a substitute thereof.</td>
</tr>
<tr>
<td>6 § 3</td>
<td>The ICRC shall hold at the disposal of the High Contracting Parties any lists transmitted to it of persons trained to facilitate the application of humanitarian law.</td>
</tr>
<tr>
<td>11 § 6</td>
<td>The Protecting Power may inspect the medical records of persons interned or detained as a result of an armed conflict.</td>
</tr>
<tr>
<td>12 § 3</td>
<td>The parties to the conflict are invited to notify each other of the location of their fixed medical units. (Note: Protocol I does not specify the channels to be used for such communication.)</td>
</tr>
<tr>
<td>25</td>
<td>A party to the conflict may notify the adverse party of the operation of medical aircraft in areas not physically controlled by the latter’s armed forces. (Note: Protocol I does not specify the channel to be used for such notifications).</td>
</tr>
<tr>
<td>29</td>
<td>The operation of medical aircraft in contact zones or areas controlled by the adverse party shall be subject to the agreement of that party. (Note: Protocol I does not specify the channel to be used for the exchange of communications leading to the conclusion of such an agreement.)</td>
</tr>
</tbody>
</table>

**Missing and Dead Persons**

| 33 | As soon as circumstances permit, and at the latest from the end of active hostilities, each party to the conflict shall search for the persons who have been reported missing by an adverse party. Requests for such information and the information itself may be transmitted either directly or through the Protecting Power, the CTA, or a National Society. Where the information is not transmitted through the ICRC, each party to the conflict shall ensure that such information is also supplied to the CTA. |

**Combatant and Prisoner-of-War Status**

| 43 § 3 | Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other parties to the conflict. (Note: Protocol I does not specify the channel to be used for such notification.) |
| 45 § 1 | A person who takes part in hostilities and falls into the power of an adverse party shall be presumed to be a prisoner of war, in particular if the party on which he depends claims such status on his behalf by notification to the Protecting Power. |
### § 2

If a judicial tribunal must determine whether a person being prosecuted for an offence arising out of the hostilities is entitled to prisoner-of-war status, the representatives of the Protecting Power have the right to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of state security.

### Civilian Population

#### § 2

The agreement establishing a demilitarized zone may be concluded either directly or through a Protecting Power or any impartial humanitarian organization.

#### § 1

A party to a conflict that consents to the activities on its territory of civil defence organizations of a neutral state shall accordingly notify any adverse party concerned. (Note: Protocol I does not specify the channel to be used for such notification.)

#### § 2

The parties to the conflict and each High Contracting Party shall allow and facilitate the passage of relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adverse party.

#### § 3

The parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power.

#### 74

The High Contracting Parties and the parties to the conflict shall encourage the activities of humanitarian organizations working to facilitate the reunion of families dispersed as a result of armed conflicts.
<table>
<thead>
<tr>
<th>Rule</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>78 § 1</strong></td>
<td>In agreement with the parties concerned, the Protecting Power shall supervise any evacuation of children.</td>
</tr>
<tr>
<td><strong>78 § 3</strong></td>
<td>The authorities of the party arranging for the evacuation of children and, as appropriate, the authorities of the receiving country, shall send to the CTA a card for each child containing full particulars of the child’s identity.</td>
</tr>
</tbody>
</table>

### Execution of the Conventions and of Protocol I

<table>
<thead>
<tr>
<th>Rule</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>81 § 1</strong></td>
<td>The parties to the conflict shall grant to the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and Protocol I in order to ensure protection and assistance to the victims of conflicts; the ICRC may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the parties to the conflict concerned.</td>
</tr>
<tr>
<td><strong>84</strong></td>
<td>The parties to the conflict shall communicate to one another, through the Protecting Power, their official translations of Protocol I as well as the laws and regulations which they may adopt to ensure its application.</td>
</tr>
<tr>
<td><strong>97</strong></td>
<td>The text of any proposed amendment to Protocol I shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the ICRC, whether a conference should be convened to consider the proposed amendment.</td>
</tr>
<tr>
<td>98 § 1 and 2</td>
<td>The ICRC shall consult the High Contracting Parties at four-year intervals concerning the possible revision of Annex I and, as appropriate, may convene a meeting of technical experts for such a revision.</td>
</tr>
</tbody>
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As the founder of the International Red Cross and Red Crescent Movement and promoter of the Geneva Conventions for the protection of war victims, the International Committee of the Red Cross has been represented on most battlefields for over a century. Nevertheless, more than 130 years after its establishment the ICRC remains largely unknown.

Although everyone has heard of the ‘International Red Cross’, the last-resort institution from which miracles are expected in times of great disasters, very few are familiar with its structure, its role and its potential for action, and even fewer are aware of the International Committee itself. International lawyers, for their part, have carefully avoided any close study of an institution which sits uneasily with their mode of thought and constantly defies classification in traditional legal categories.

How the International Committee of the Red Cross is constituted, what tasks are assigned to it and what principles guide its work – these are some of the questions which the author seeks to answer, by adopting a combined historical and legal approach designed to show how the development of international humanitarian law, of which it is both promoter and trustee, mirrors and is in turn reflected in the action taken by the ICRC.

This work, written in a simple and direct style, is primarily intended for all those involved in humanitarian action, but also for all those who are concerned about the protection of human beings amongst the horrors of war.

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